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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

CED'S, INC., d/b/a PRODUCTS FOR POWER,
Petitioner,

vs.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, and LEE THOMAS, Acting Administrator, United States Environmental Protection Agency,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

Petitioner manufactures an automotive product which has several recognized lawful uses. Petitioner's product is resold through two to three distribution levels before it is ever installed in a vehicle. No Federal law prohibits this sale or manufacture, but automotive workmen are prohibited from installing the device under certain conditions.

The EPA sought to seize petitioner's business records. To obtain the necessary warrant, EPA filed an application stating that, by the mere *manufacture* and *sale* of the device, petitioner *may be* "causing" some consumers several times removed from petitioner to install the device on automobiles in an illegal manner. Yet EPA furnished no evidence of any such "causing" by petitioner—the warrant application contained only a boilerplate recitation of a statutory violation by automobile repairpersons.

The Seventh Circuit Court of Appeals, reversing the trial court, upheld EPA's authority to obtain an administrative warrant bottomed on an unsupported, unarticulated statutory violation by others. The Court of Appeals' ruling raises the following constitutional questions:

1. Whether EPA should be treated differently from all other government agencies by being vested with unbridled authority to search any premises, commercial or residential, without having to make any showing whatsoever of a statutory violation by the person to be searched?

2. Are the clear and explicit standards for demonstrating probable cause established by this Court in *Camara* v. *Municipal Court,* 387 U.S. 523 (1967), and *Marshall* v. *Barlow's,* 436 U.S. 307 (1978), applicable to the issuance of a warrant obtained by EPA pursuant to its authority under the Clean Air Act?

3. If so, does the unsupported assertion in a warrant application that a search is necessary "in order to determine whether violations of section 203(a) of the Act *have been* or are

being committed . . ." (emphasis added), without any evidence or even a hint of an actual violation by the person to be searched, satisfy the probable cause standards of *Camara* and *Barlow's*?

PARTIES TO THE PROCEEDING

The caption of the case in this Court contains the names of all parties. There are no parent companies, subsidiaries, or affiliates.

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, and LEE THOMAS, Acting Administrator, United States Environmental Protection Agency,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

CED's, Inc., d/b/a Products for Power ("CED's"), respectfully petitions for a writ of certiorari to review the opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on September 28, 1984.

OPINIONS BELOW

The opinion of the Seventh Circuit Court of Appeals in *CED's, Inc., d/b/a Products for Power* v. *United States Environmental Protection Agency and Lee Thomas, Acting Administrator, United States Environmental Protection Agency,* not yet officially reported, is reproduced in the Appendix to this petition. App. C, p. 4a. The memorandum opinions, final

orders and judgment of the district court, which were not officially reported, are reproduced in the Appendix to this petition. App. D, p. 20a; App. E p. 29a.

JURISDICTION

The opinion of the Seventh Circuit Court of Appeals in this case was entered on September 28, 1984. A petition for rehearing with a suggestion for rehearing *en banc* was denied on October 29, 1984. App. B, p. 3a. The Seventh Circuit subsequently granted CED's motion to stay the mandate until December 10, 1984. App. A, p. 2a. This petition is being filed within the time specified in Rule 20.2 of the Rules of the Supreme Court and 28 U.S.C. § 2101(c).

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). Jurisdiction in the district court was based on the existence of a federal question, 28 U.S.C. § 1331, concerning the provisions of the Clean Air Act, 42 U.S.C. § 7401 *et seq.*

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue but upon probable cause, supported by Oath or Affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const., amend. IV.

Section 114(a) of the Clean Air Act, 42 U.S.C. § 7414(a), provides in pertinent part:

> (a) For the purpose of (i) developing or assisting in the development of any implementation plan under section 7410 or 7411(d) of this title, any standard of performance under section 7411 of this title, or any emission standard under section 7412 of this title, (ii) determining whether any person is in violation of such standard or any requirement of such plan, or (iii) carrying out any provision of this chapter (except a provision of subchapter II of this chapter with respect to a manufacturer of new motor vehicles or new motor vehicle engines)—
>
> (1) The Administrator may require any person who owns or operates any emission source or who is subject to any requirement of this chapter (other than a manufacturer subject to the provisions of section 7525(c) or 7542 of this title) with respect to a provision of subchapter II of this chapter to (A) establish and maintain such records, (B) make such reports, (C) install, use, and maintain such monitoring equipment or methods, (D) sample such emissions (in accordance with such methods, at such locations, at such intervals, and in such manner as the Administrator shall prescribe), and (E) provide such other information as he may reasonably require; and

(2) The Administrator or his authorized representative, upon presentation of his credentials—

(A) shall have the right of entry to, upon, or through any premises of such person or in which any records required to be maintained under paragraph (1) of this section are located, and

(B) may at reasonable times have access to and copy any records, inspect any monitoring equipment or method required under paragraph (1), and sample any emissions which such person is required to sample under paragraph (1).

42 U.S.C. § 7414(a).

Section 203(a) of the Clean Air Act, 42 U.S.C. § 7522(a)(3)(A) and (B), under which EPA asserts that CED's falls within the coverage of the Clean Air Act, states in relevant part:

(a) The following acts and the causing thereof are prohibited—

* * * * *

(3)(A) For any person to remove or render inoperative any device or element of design installed on or in a motor vehicle or motor vehicle engine in compliance with regulations under this part prior to its sale and delivery to the ultimate purchaser, or for any manufacturer or dealer knowingly to remove or render inoperative any such device or element of design after such sale and delivery to the ultimate purchaser; or

(B) For any person engaged in the business of repairing, servicing, selling, leasing, or trading motor vehicles or motor vehicle engines, or who operates a fleet of motor vehicles, knowingly to remove or render inoperative any device or element of design installed on or in a motor vehicle

> or motor engine in compliance with regulations under this subchapter following its sale and delivery to the ultimate purchaser; or
>
> * * * * *

42 U.S.C. § 7522(a)(3)(A) and (B).

STATEMENT OF THE CASE

THE PARTIES

Petitioner CED's, Inc., d/b/a Products For Power (CED's), operates a small manufacturing business in Addison, Illinois. Among the engine exhaust system parts manufactured at this plant is a device known as a "Test Tube", a product marketed under CED's registered trademark. The Test Tube has several well-recognized and lawful uses. Primarily, it may be used by any individual or entity to perform tests on the efficiency and efficacy of a catalytic converter that has been installed in an automobile exhaust system. Also, under federal law, an individual motorist may lawfully and permanently replace his automobile's catalytic converter with a Test Tube. It is, however, unlawful for a person engaged in the business of repairing, servicing, selling, leasing or trading of motor vehicles to permanently remove catalytic converters.

CED's does not, in general, sell its Test Tubes to muffler shops, the general public, or to retail outlets. Nor does CED's sell its Test Tubes to automobile manufacturers or to any new or used automobile dealers. CED's sells Test Tubes primarily to a single category of businesses: warehouse distributors. Test Tubes are marketed nationally by CED's and are sold in 49 of the 50 states.[1] Test tubes are also marketed for sale abroad and to the United States military. EPA has *never* alleged that CED's has ever either directed or directly caused any person

[1] CED's does not sell its Test Tube in California. There, the sale of devices which are capable of being used to eliminate pollution control devices is specifically prohibited.

engaged in the business of repairing, servicing, selling, leasing, or trading of motor vehicles to remove or render inoperative any pollution control equipment.

THE WARRANT

On April 5, 1983, EPA filed an application for an administrative search warrant with United States Magistrate Sussman, pursuant to its administrative search authority under Section 114 of the Clean Air Act, 42 U.S.C. § 7414. App. H, p. 49a. In the warrant application, EPA alleged that CED's "may be causing" violations of the Clean Air Act by the "sale, distribution and promotion" of Test Tubes. An extensive search was requested so that EPA could "determine whether violations of section 203(a) of the Act have been or are being committed by Products for Power . . . ." No violations of the Clean Air Act were asserted, nor did the warrant application contain any evidence of such violations.[2] Magistrate Sussman granted EPA's application and issued a civil inspection warrant, authorizing virtually a complete inspection of CED's facility. App. G, p. 46a. This inspection included the review and copying of virtually all of CED's business records, including correspondence, raw material purchases, advertising records, production records, sales records, customer lists, and inventory lists.[3] The warrant additionally authorized without restriction the inspection of CED's facility and the taking of photographs of the facility.

Pursuant to the warrant, on April 6, 1983, EPA agents and a United States Marshall entered CED's facility and examined, inspected, and copied the documents specified in the warrant.

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[2] The affidavits attached to the warrant application, if assumed to be true, established only that some muffler shops may be permanently removing catalytic converters. *See* App. H, p. 49a.

[3] Since EPA had no evidence, nor even a theory, as to how the mere manufacture and sale of Test Tubes could amount to a "causing" (i.e. an improper installation), the scope of the warrant was extremely broad.

As the inspection was being carried out, CED's filed with Magistrate Sussman a motion to quash the warrant for lack of probable cause. Following a hearing, CED's motion to quash was denied.

THE DISTRICT COURT

CED's then filed a complaint for injunctive relief and a notice of appeal from the magistrate's order with the district court on April 7, 1983. In response, EPA filed a motion to dismiss CED's complaint. After an emergency hearing an interim agreement was reached between the parties, in which EPA agreed to refrain from contacting CED's customers and from using the information seized other than for purposes of review, interpretation and collation. On CED's motion, the district court stated that it would treat CED's motion for injunctive relief as a motion for both temporary and permanent relief.

On July 1, 1983, the district court granted CED's motion for a permanent injunction, prohibiting EPA from making further use of the business records obtained under the administrative warrant. App. E, p. 29a. The court also ordered EPA to return all copied documents to the plaintiff. In so holding, the court concluded that EPA had no authority under § 114(a) of the Clean Air Act to enter and inspect CED's records.

EPA moved for a stay pending appeal of the district court's order. In its motion of July 20, 1983, EPA reiterated several contentions previously made and also attacked the substance of the district court's July 1, 1983 order. In a hearing on July 22, 1983, EPA reiterated its challenges to the original holding of the district court. At several points in the hearing the district court stated that it would reconsider contentions made by EPA. The court noted that it would treat EPA's motion for a stay as a motion to amend the July 1 order and would accordingly either consider its original order as merely a preliminary injunction or it would issue a supplementary opinion. No objection was made by EPA. On August 31, 1983, EPA filed a notice of

appeal from the district court's order of July 1, 1983. All documents seized by EPA have since been held by the Department of Justice pending the resolution of this appeal.

On November 6, 1983, the district court entered a supplemental memorandum opinion and order clarifying its original order and denying EPA's motion for a stay pending appeal. In its supplemental order, the court held that CED's could not "cause" a violation of the Clean Air Act by the mere manufacture and sale of Test Tubes.[4] The district court reaffirmed its original holding that injunctive relief was appropriate in light of the irreparable harm CED's would suffer from the search. The district court denied EPA's stay application, concluding that it had failed to show that a stay was appropriate.

THE COURT OF APPEALS

On September 28, 1984, a panel of the Seventh Circuit Court of Appeals reversed the judgment of the district court and ordered the injunction dissolved and CED's complaint dismissed. The panel held that sections 114 and 203(a) of the Clean Air Act give blanket authority to EPA to inspect the records of any person who is "subject to" a requirement of the Act and that "CED's, along with everyone else, is clearly prohibited ... from causing any act described in subsection 3(B)." App. C, p. 10a. The appellate court concluded that EPA had the right to inspect CED's facility and to seize its records. The panel failed to address in any way whether the

[4] As did a district court in Georgia, when faced with the same question in a search launched by EPA the same day as the CED's search. *See National Muffler Manufacturing Co., Inc.* v. *U.S. EPA*, No. C83-929A (N.D. Ga. Sept. 21, 1983), App. F, p. 37a.

warrant application complied with the probable cause requirements of the Fourth Amendment.[5]

CED's subsequently filed a petition for rehearing with a suggestion for rehearing *en banc,* urging the full Seventh Circuit to review the panel's opinion. CED's argued that the panel's decision allows EPA the right to inspect the records of any entity without regard to the Fourth Amendment probable cause requirements. Under the Seventh Circuit's analysis, in order for EPA to search the premises of any individual or entity, EPA need only allege that the person or entity "may be" causing a violation of the Act. On October 29, 1984, the Seventh Circuit denied CED's petition for rehearing. App. B, p. 3a.

On November 3, 1984, CED's moved the Seventh Circuit to stay the issuance of its mandate pending CED's application to this Court for a writ of certiorari. Six days later, Judge Eschbach, author of the panel's opinion, granted CED's petition for a stay of the mandate, up to December 10, 1984. This petition for certiorari followed.

REASONS FOR GRANTING CERTIORARI

The breadth and scope of administrative regulatory statutes such as the Clean Air Act touch virtually every commercial entity in this country. While many of these acts have been broadly written and interpreted, this Court has consistently stated that no enactment may supercede constitutional protections. In this case, however, the Seventh Circuit has given to EPA under the Clean Air Act unprecedented search and seizure authority; authority unknown to any other governmental agency.

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[5] CED's has repeatedly raised this probable "causing" issue throughout the course of this proceeding. The district court found no showing of a "causing" and further held that EPA lacked statutory authority to search an unregulated manufacturer such as CED's. The Seventh Circuit reversed on the authority issue and leap-frogged the critical probable cause issue to reach its unprecedented holding.

Unless the opinion of the Seventh Circuit is corrected by this Court, Magistrates will be empowered to grant EPA warrant applications on the naked assertion that a "violation" *may* be occurring. No other agency has such authority, even those charged with criminal law enforcement. Yet EPA may now search anywhere to investigate a single civil prohibition.

Certiorari should thus be granted in this case because the opinion of the Seventh Circuit fails to apply, and totally disregards, this Court's decisions in *Marshall* v. *Barlow's,* 436 U.S. 307 (1978), *Camara* v. *Municipal Court,* 387 U.S. 523 (1967), and their progeny.[6] Those cases require that before a finding of probable cause justifying an administrative search and seizure can be made, there must exist either (i) specific evidence of a violation of an administrative regulation or law, or (ii) evidence that the search is sought pursuant to an articulated administrative plan based on neutral criteria.[7] EPA failed to satisfy these requirements in obtaining the warrant at issue. The Seventh Circuit upheld the warrant, employing the following unprecedented analysis:

(1) CED's (along with everyone else) is subject to the provisions of the Clean Air Act;

(2) "the plain language of the Act authorizes the EPA to copy any records of any person subject to any requirement of the Act . . ."; and

(3) therefore, EPA may have access to and copy *any* records CED's may possess.

At no time did the Seventh Circuit address the applicability of the Fourth Amendment, *Barlow's, Camara,* or probable cause. By its analysis the Seventh Circuit has effectively eliminated the requirement that probable cause be shown to justify the search of a commercial entity.

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[6] One of which is the Seventh Circuit's own case, *Weyerhaeuser* v. *Marshall,* 592 F.2d 373 (7th Cir. 1979), the facts of which are almost identical to those here.

[7] EPA has never asserted that the search was part of an administrative plan.

Certiorari should also be granted to define what facts must be shown by a governmental agency to satisfy the constitutional requirement of probable cause in order to justify a nonconsensual inspection of a business premise. In the immediate case, EPA alleged only that a search was necessary to determine whether CED's "MAY BE" causing a violation of the Clean Air Act. No facts establishing probable cause were adduced. The showing required of EPA before it can engage in a nonconsensual seizure of records is of great concern to all individuals and entities subject to the Clean Air Act, as well as to those who are subject to other federal regulatory statutes.

There is also a compelling need for this Court to provide guidance to the lower courts in the application of the probable cause standards of *Barlow's.* As this Court has noted many times, explicit probable cause requirements serve to inform the magistrate of the violation in question, and thereby help limit the search to a reasonable scope, ensuring adherance to Fourth Amendment principles. A definitive statement from this Court regarding the showing that is necessary to meet administrative probable cause standards will ensure future consistent and proper application of *Barlow's,* and will serve to put business entities on notice as to when their premises may be subject to a search or seizure. For not only must laws, regulations, and court decisions provide a clear mandate of congressional or agency intentions, they must also provide guidance to those persons affected so that those persons may structure their future conduct to comply with the law.

The Seventh Circuit's decision fails to adequately guide U.S. magistrates, judges, or business entities through its failure to delineate when and to what extent businesses may be the subject of a search and seizure under the Clean Air Act.

A. The Decision of the Court of Appeals Conflicts With and Ignores this Court's Decisions in Camara and Barlow's.

The Seventh Circuit concluded that "the plain language of the Act authorizes the EPA to copy any records of any person

subject to any requirement of the Act. . . ." App. C, p. 17a. Applying this conclusion, the Court reasoned that since "CED's, along with everyone else, is clearly prohibited . . . from causing any act described in subsection (3)(B)," App. C, p. 10a, EPA has authority to search and inspect CED's premises. Under the court's analysis, EPA has unbridled discretion to inspect the records of any individual or entity without any consideration of the Fourth Amendment protections from unreasonable search and seizure. The EPA may now obtain warrants to randomly search and inspect the records of any individual or entity, merely to ascertain whether they *"might be"* causing a violation, without even a requirement that the supposed violation be articulated. Such judicially-condoned fishing expeditions constitute a total abrogation of Fourth Amendment probable cause protections.

Prior Supreme Court cases have firmly established that the Fourth Amendment's prohibition against unreasonable searches applies to administrative inspections of private commercial property. *Marshall* v. *Barlow's,* 436 U.S. 307 (1978); *Camara* v. *Municipal Court,* 387 U.S. 523 (1967). In *See* v. *City of Seattle,* 387 U.S. 541, 543 (1967), the Supreme Court noted:

> The businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property. The businessman, too, has that right placed in jeopardy if the decision to enter and inspect for violation of regulatory laws can be made and enforced by the inspector in the field without official authority evidenced by a warrant.

Id. at 543. Inspections of commercial property have been held to be unreasonable if they are not authorized by law or are unnecessary for the furtherance of federal interests. *Colonnade Catering Corp.* v. *United States,* 397 U.S. 72, 77 (1970).

The importance of a warrant in the administrative scheme is well recognized. This Court has observed that where Congress has authorized an inspection, but has made no rules governing the procedures that inspectors must follow, the Fourth Amendment and its various restrictive rules are to apply. *Colonnade Catering Corp.* v. *United States,* 397 U.S. 72, 77 (1970). Warrants are necessary to protect the owner from the "unbridled discretion [of] executive and administrative officers," *Marshall* v. *Barlow's,* 436 U.S. at 323, by assuring the owner that "reasonable legislative or administrative standards for conducting inspection are . . . satisfied with respect to a particular [establishment]." *Camara* v. *Municipal Court,* 387 U.S. 523, 538 (1967). In the absence of evidence of probable cause, a search of a commercial premise may be justified only in the following situation:

> [A] warrant may not be constitutionally required when Congress has reasonably determined that warrantless searches are necessary to further a regulatory scheme and the federal regulatory presence is sufficiently comprehensive and defined that the owner of commercial property cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes.

Donovan v. *Dewey,* 452 U.S. 594, 601 (1981).

A plain reading of section 203(a)(3) of the Clean Air Act could not make CED's aware that its facility is or could be subject to inspection by EPA.[8] CED's is not "engaged in the business of repairing, servicing, selling, leasing, or trading motor vehicles or motor vehicle engines." CED's does not "operate a fleet of motor vehicles." Nor is CED's defined as a "manufacturer or dealer." *See* 42 U.S.C. § 7527. How then is CED's supposed to anticipate that its facility could be searched by EPA?

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[8] CED's is not presently subject to any EPA-promulgated regulations.

The Seventh Circuit's opinion does not provide any answer.

This Court has noted only last term that in the absence of a specific legislative framework, the constitutional requirements of probable cause *must* be met in order to allow a nonconsensual entry into a commercial area not open to the public. *Donovan* v. *Lone Steer, Inc.*, ____ U.S. ____, 104 S.Ct. 769, 773 (1984). The Seventh Circuit's use of its novel analysis directly conflicts with the rules established by this Court in *Camara, Barlow's, Lone Steer,* and other cases addressing administrative warrant requirements.

The Seventh Circuit's decision gives EPA *carte blanche* to engage in the inspection of any records in any facility which is, or which EPA believes to be, subject to the Clean Air Act. If left undisturbed, the Seventh Circuit's decision will not only result in searches and seizures that are unauthorized by the Clean Air Act, but it will also do away with probable cause requirements. The new logic expressed in the Seventh Circuit's holding could be equally applied to other major regulatory statutes. Because of the likelihood that EPA will engage in the future inspections of facilities that are, or may be, subject to its provisions, this Court should provide clear guidance to the lower courts on the application of *Barlow's* probable cause requirements to such inspections. Without any clear explanation of the *Barlow's* probable cause standard, the lower courts may acquiesce in the intrusive and unjustified enforcement of federal legislation at the expense of the constitutional rights of those subject to its reach.

B. The Seventh Circuit's Holding Fails to Address The Allegations Necessary to Show Probable Cause.

The sole justification given by EPA for the search of CED's premises was their *belief* that CED's *may* "cause" improper installations of its product simply by the manufacture, promotion and ultimate distribution of Test Tubes to automotive repair facilities. Application for Warrant, App. H. p. 50a. In its

brief to the Seventh Circuit, EPA asserted that it *could not determine* whether CED's had "caused" violations of the Clean Air Act until after "a complete investigation of all the facts and circumstances surrounding CED's operation . . . ." EPA Brief, p. 8 n.8. This approach is constitutionally unpermitted. The Seventh Circuit, however, failed to address the issue of whether EPA had satisfied the Fourth Amendment's probable cause requirements. Had the Seventh Circuit tested EPA's actions against the standards set forth in *Camara* and *Barlow's,* it would have found that there was no probable cause to support the issuance of the warrant.[9]

The probable cause required of EPA to justify its search in this case is neither burdensome nor unreasonable. This Court has noted that probable cause in the criminal law sense is not required. *Marshall* v. *Barlow's,* 436 U.S. 307, 321 (1978). But even for purposes of an administrative search, probable cause justifying the issuance of a warrant must nevertheless be based either on *specific evidence* of an existing statutory or administrative violation or on a showing that reasonable legislative or administrative standards for conducting an inspection have been satisfied. *Id.* at 321. Reasonable administrative standards have always been interpreted to require the agency in question to have promulgated regulations after appropriate notice and hearing opportunities have been provided. *Batterton* v. *Mar-*

[9] Other Seventh Circuit decisions have required that administrative warrants comply with the Fourth Amendment's requirements for administrative probable cause. *See, e.g., Weyerhaeuser Co.* v. *Marshall,* 592 F.2d 373 (7th Cir. 1979). In *Weyerhaeuser,* the warrant application was defective because the "magistrate was given no clue as to what the nature of the alleged violation might be. The affidavit is unrelieved boilerplate . . ." *Id.* at 378. Such language is directly applicable to the case at bar. Other circuit courts of appeals have uniformly tested the validity of a warrant by the probable cause standards established by this Court in *Barlow's. See Donovan* v. *Wollaston Alloys, Inc.,* 695 F.2d 1 (1st Cir. 1982); *United States* v. *Mississippi Power & Light Co.,* 638 F.2d 899 (5th Cir.), *cert. denied,* 454 U.S. 892 (1981); *Stoddard Lumber Co., Inc.* v. *Marshall,* 627 F.2d 984 (9th Cir. 1980).

shall, 648 F.2d 694 (D.C. Cir. 1980). There are *NO* regulations promulgated by EPA which require a manufacturer of automotive replacement parts or automotive testing devices to perform any of the record keeping requirements specified in section 114(a)(1) of the Clean Air Act. Consequently, EPA has no authority to inspect the business premises of CED's, as section 114(a)(2) grants EPA authority to inspect only those business records required by section 114(a)(1) to be maintained. Absent such legislative authority, specific evidence of an existing violation of the Clean Air Act was required.

There was no allegation anywhere that there was probable cause to believe that CED's was in violation of the Clean Air Act. EPA has never even contended that such facts exist. Moreover, at no time did EPA assert that its search was authorized by an administrative plan based on any neutral criteria. Instead, EPA sought to seize and inspect CED's records in an effort to determine at a later date whether CED's may perhaps be "causing" a violation of the Act. However, the manufacture, distribution and sale of Test Tubes is lawful; the Seventh Circuit's opinion fails to provide CED's (or anyone else) with any clue as to the actual nature of any alleged violation which would justify the inspection of its premises.

To "cause" is to be the agent or force which produces an effect or result. Under the Clean Air Act the prohibited result is *improper* installation. Neither EPA nor the Seventh Circuit has articulated how the "sale, distribution and promotion of Test Tubes," either to warehouse distributors (as is CED's business practice) or to "regulated automotive repair facilities" (as EPA alleged in its Application for Warrant) could in any way result in CED's knowing participation in the removal or rendering inoperative of an emission control device by an automobile manufacturer, dealer, fleet operator, or repair shop. The most that could be alleged by EPA is that CED's products might

make it easier or quicker for the actions prescribed by the Clean Air Act to occur. However, any entity described in section 203(a)(3) which has pipe-bending machinery and tubular steel at its premises could create a device which could be used to remove or render inoperative a catalytic converter.[10] By following the analysis of the Seventh Circuit, EPA could allege that the manufacturer of the pipe-bending machine, or the supplier of steel tubing, could "cause" a violation of the Clean Air Act. Indeed, CED's equipment vendors and suppliers of raw materials could, under the Seventh Circuit's analysis, be deemed to have "caused" a violation of the Clean Air Act, and therefore be subjected to searches and seizures. Surely this result could not have been intended by the Seventh Circuit, and action by the Supreme Court is necessary to correct the impression to the contrary left by the appellate court's opinion.

There is, and can be, no support for EPA's assertion that its search is permissible simply to determine "whether" a violation of the Clean Air Act may have occurred. Just as a constable may not be allowed to enter a home to determine whether a crime may be taking place, EPA *may not* randomly inspect a business entity and search its premises to determine whether a violation "may have" occurred. The panel's opinion gives EPA *carte blanche* to inspect the records of any business or person so long as the search is claimed to be under a legislative framework. EPA has not even advanced the theory of how CED's has violated the Clean Air Act. The substitution of boilerplate language for specificity strips the magistrate of his probable cause function. *See Marshall* v. *Barlow's*, 436 U.S. at 324.

Indeed, the very purpose of the warrant requirement is to have the probable cause determination made by a detached

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[10] Ironically, muffler shops are the least likely installers of Test Tubes, since most shops possess the machinery to fabricate pipe for less money than the cost of a Test Tube.

judicial officer rather than an overzealous law enforcement agency. *See Coolidge v. New Hampshire,* 403 U.S. 443, 449 (1971). Under the Seventh Circuit's framework, since "everyone" is subject to the Clean Air Act, the magistrate now serves merely a rubber stamp function. EPA no longer has to allege that a search is part of a legislative scheme or even that a violation has occurred. It need not even advance a scintilla of evidence as to whether a supposed violation has occurred. As long as it is conceivable to the mind of one EPA employee that one can "cause" a violation, no further analysis by a court is permitted or necessary in the Seventh Circuit. The Seventh Circuit's holding is applicable not only to manufacturers of automotive parts, but to any organization or entity within the stream of commerce. This surely is not the intent of the framers of the Clean Air Act.

In short, EPA's warrant application falls far short of meeting the *Barlow's* test for probable cause. By ignoring the strict requirements of the Fourth Amendment, the Seventh Circuit has removed the important function of a neutral and detached magistrate and instead leaves him to rubber-stamp EPA requests for search warrants. EPA may now merely assert that it wishes to ascertain whether a violation may have been committed. This Court should correct the Seventh Circuit's error.

CONCLUSION

For reasons set forth herein, the petition for a writ of certiorari to review the opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on September 28, 1984 should be granted.

Respectfully submitted,

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APPENDIX

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EXHIBIT A

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

November 9, 1984.

Before

Hon. JESSE E. ESCHBACH, *Circuit Judge*

CED'S, INC., d/b/a PRODUCTS FOR POWER,
Plaintiff-Appellee,

No. 83-2608 *vs.*

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and LEE THOMAS, Acting Administrator, United States Environmental Protection Agency,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 83 C 2409

John A. Nordberg
Judge

On consideration of the "CED'S, INC.'S MOTION FOR STAY OF MANDATE PENDING APPLICATION TO THE SUPREME COURT FOR A WRIT OF CERTIORARI" filed herein on November 3, 1984, by counsel for plaintiff-appellee,

IT IS ORDERED that said motion is hereby GRANTED and the mandate of this court is STAYED to and including December 10, 1984.

EXHIBIT B

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

October 29, 1984

Before

Hon. JESSE E. ESCHBACH, *Circuit Judge*
Hon. JOEL M. FLAUM, *Circuit Judge*
Hon. WILLIAM J. JAMESON, *Senior District Judge**

CED'S INC., d/b/a PRODUCTS FOR POWER,
Plaintiff-Appellee,

No. 83-2608 *vs.*

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, and LEE THOMAS, Acting Administrator, United States Environmental Protection Agency,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 83 C 2409

John A. N[illegible]dberg,
Judge.

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause by plaintiff-appellee, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

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* The Honorable William J. Jameson, Senior District Judge for the District of Montana, sitting by designation.

EXHIBIT C

In the

United States Court of Appeals

For the Seventh Circuit

No. 83-2608

CED'S INC., d/b/a PRODUCTS FOR POWER,

Plaintiff-Appellee,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, and LEE THOMAS, Acting Administrator, United States Environmental Protection Agency,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 83 C 2409—**John A. Nordberg**, *Judge.*

ARGUED APRIL 9, 1984—DECIDED SEPTEMBER 28, 1984

Before ESCHBACH and FLAUM, *Circuit Judges*, and JAMESON, *Senior District Judge.**

ESCHBACH, *Circuit Judge.* The Environmental Protection Agency appeals from an order of the district court enjoining it from making use of copies of business records it had obtained from Ced's Inc. under an administrative warrant and ordering it to return the copies to the company. The principal issue presented is the scope of the

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* The Honorable William J. Jameson, Senior District Judge, United States District Court of Montana, sitting by designation.

Environmental Protection Agency's authority to copy records of companies under section 114(a) of the Clean Air Act. We reverse.

I

Ced's Inc. ("Ced's"), doing business as Products for Power, manufactures and distributes automotive engine exhaust equipment, including a device known as the "Test Tube," a length of hollow metal pipe shaped and fitted to replace the catalytic converter in an automobile exhaust system. Under section 203(a) of the Clean Air Act (the "Act"), 42 U.S.C. § 7522(a)(3)(B), those in the business of repairing and servicing automobiles are prohibited from permanently replacing a catalytic converter with a pipe such as the Test Tube, although they may temporarily make the substitution for the purpose of determining if the catalytic converter needs to be replaced. The owner of an automobile is not prohibited from permanently replacing its catalytic converter with a Test Tube. Ced's markets the Test Tube nationwide, but exclusively to warehouse distributors, not directly to retailers or automotive repair facilities.

The Environmental Protection Agency ("EPA") suspects that the unlawful permanent installation of catalytic converter replacement pipes by automotive repair and service facilities is a pervasive problem with potentially far-reaching deleterious environmental consequences. It has accordingly been investigating the practice.

On April 5, 1983, the EPA applied to a magistrate for an administrative warrant under section 114(a) of the Act, 42 U.S.C. § 7414(a), authorizing the examination and copying of certain of Ced's business records pertaining to the promotion and sale of the Test Tube. The application was based on evidence which, the EPA claimed, established administrative probable cause to believe that Ced's may have caused certain automobile repair facilities to remove catalytic converters permanently and to replace them with Test Tubes in violation of section 203(a) of the Act. The

magistrate issued the warrant *ex parte*. On April 6 EPA agents served the warrant, entered Ced's facility during normal business hours, and examined and copied documents. While the inspection was in progress, Ced's filed with the magistrate a motion to quash the warrant. A hearing was held on April 6, and the magistrate denied the motion.

On April 7 Ced's filed a motion in the district court seeking a temporary restraining order or preliminary injunction enjoining execution of the warrant and ordering the return of the documents, and a complaint requesting a permanent injunction forbidding the EPA to enter Ced's premises and to inspect Ced's records. On the same day the EPA filed a motion to dismiss the complaint. The court held hearings on these motions and on July 1 signed an order and issued a memorandum opinion denying the EPA's motion to dismiss, granting a permanent injunction prohibiting the EPA from making any use of materials obtained from Ced's under the administrative warrant, and ordering the EPA to return those materials, including any copies, to the company. The order was entered on July 6.

On July 22 the EPA filed its motion for stay pending appeal, and on August 5 the district court stayed compliance with that portion of its order that required the EPA to return to Ced's copies of documents that were inspected pursuant to the administrative search warrant. On August 31 the EPA filed its notice of appeal to this court.

On November 1 the district court (apparently viewing its order of August 5 as merely an interim order) entered a second order with respect to the EPA's motion for stay pending appeal, this time denying the motion but permitting the EPA to retain the copies of Ced's documents pending the appeal, without using them in any way. Attached to the order was a supplemental memorandum opinion which did not address itself to the EPA's motion for a stay but instead set forth additional grounds in sup-

port of its order of July 1 granting a permanent injunction. The additional grounds took the form entirely of conclusions of law; there were no new findings of fact.

In this appeal the EPA contends that the district court erroneously determined that the EPA had no authority under section 114(a)(2)(B) of the Act to inspect and copy Ced's business records and that the district court exceeded its jurisdiction by issuing a supplemental memorandum opinion amending its previous order after the EPA had filed its notice of appeal.

II

Because it affects the scope of our review, we consider first the question whether the district court exceeded its jurisdiction in issuing the supplemental memorandum opinion on November 1, nearly four months after judgment was entered and two months after the EPA filed its notice of appeal.

As the EPA points out, there is a general rule that the filing of a notice of appeal divests the district court of jurisdiction over the matters appealed. *Lenard v. Argento*, 699 F.2d 874, 898 (7th Cir.), *cert. denied*, 104 S. Ct. 69 (1983); *United States v. Bastanipour*, 697 F.2d 170, 173 (7th Cir. 1982), *cert. denied*, 103 S. Ct. 1790 (1983); *McClatchy Newspapers v. Central Valley Typographical Union No. 46*, 686 F.2d 731, 734 (9th Cir.), *cert. denied*, 103 S. Ct. 491 (1982). There are exceptions for certain actions serving to preserve the status quo pending the appeal, *United States v. El-O-Pathic Pharmacy*, 192 F.2d 62, 79 (9th Cir. 1951), or to assist the court of appeals in its determination. *United States v. Lafko*, 520 F.2d 622, 627 (3d Cir. 1975).[1]

[1] The rule does not operate where there is a purported appeal from a non-appealable order. *United States v. Bastanipour*, 697 F.2d 170, 173 (7th Cir. 1982), *cert. denied*, 103 S. Ct. 1790 (1983). Even though there is no judgment of record, the order of perma-

(Footnote continued on following page)

We are persuaded that none of the exceptions to the rule is applicable here. Even if the district court was motivated by a desire to assist this court in its determination by stating additional conclusions of law on the basis of which this court might affirm the order, the assistance in this case came too late.[2] The filing of a notice of appeal sets the appellate clock running, and the parties and the clerk of the court become subject to deadlines imposed by the rules. The parties to an appeal are entitled to have a stable set of conclusions of law on which they can rely in preparing their briefs. The district court issued its supplemental memorandum opinion only a week before appellant EPA's opening brief was due, making it necessary for the EPA to prepare a supplemental brief and appendix and requiring the preparation of a supplemental record on appeal.

The district court stated at the hearing on the EPA's motion for stay pending appeal that because of the issues raised the court would treat it "in effect, as the equivalent

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[1] *continued*
nent injunction purports to be a final adjudication of the merits, and both parties founded appellate jurisdiction on 28 U.S.C. § 1291. We take it that they have waived the requirement of Rule 58 that a judgment be entered on a separate document. *See Bankers Trust Co. v. Mallis*, 435 U.S. 381, 384-85 (1978).

We note also that the district court entered its final order before the EPA had filed an answer. Although such procedure is irregular, the EPA did not assign it as error, and our review of the transcripts satisfies us that the EPA's position on the matters raised in the complaint was adequately presented to the district court and to Ced's. Because of the posture in which we find this matter and the finality of the district court's order, we do not view the absence of an answer in this case as a barrier to our review under 28 U.S.C. § 1291.

[2] We note in passing that the supplementation of findings of fact is governed by Fed. R. Civ. P. 52(b), and the effect of a Rule 52(b) motion on the time for appeal is governed by Fed. R. App. P. 4(a)(4). Since the district court did not make any new or amended findings of fact in its supplementary memorandum opinion, Rule 52(b) does not apply.

of a motion to reconsider." Transcript of Hearing, July 22, 1983, at 5. Under Rule 4(a)(4) of the Federal Rules of Appellate Procedure, a timely motion under Rule 59 of the Federal Rules of Civil Procedure postpones the time for appeal until the entry of an order granting or denying the motion, and a notice of appeal filed before the disposition of the motion has no effect. For purposes of Rule 4(a), a motion to reconsider is treated as a Rule 59(e) motion. *Lenard v. Argento*, 699 F.2d 874, 898 (7th Cir.), *cert. denied*, 104 S. Ct. 69 (1983). But even if we view the EPA's motion to stay as a motion to reconsider, and thus as equivalent to a Rule 59(e) motion, it was clearly out of time. Rule 59(e) sets a limit of ten days after entry of judgment, and the EPA's motion was filed later. Rule 4(a)(4), therefore, does not apply.

Accordingly, the district court's supplemental memorandum opinion of November 1, 1983 is vacated. We thus need not consider the EPA's assignments of error relating to that opinion.

III

A

We come now to the central issue in the case: whether the EPA had authority to carry out its inspection and copying of Ced's records. The EPA bases its assertion of authority over Ced's on the premise that Ced's is a "person . . . subject to any requirement of the Act," within the meaning of section 114(a)(1).[3] Specifically, the

[3] Section 114(a)(1), as codified at 42 U.S.C. § 7414(a)(1), reads in pertinent part as follows:

> (1) The Administrator may require any person who owns or operates any emission source or who is subject to any requirement of this chapter (other than a manufacturer subject to the provisions of section 7525(c) or 7542 of this title) with respect to a provision of subchapter II of this chapter to (A) establish and maintain such records . . . as he may reasonably require . . . .

(Footnote continued on following page)

EPA asserts, Ced's is subject to section 203(a), which enumerates certain prohibitions. Ced's denies that it is subject to section 203(a) or to any other requirement of the Act.[4] We agree with the EPA.

Section 203(a) begins: "The following acts and *the causing thereof* are prohibited . . . ." 42 U.S.C. § 7522(a) (emphasis added). Subsection (3)(B) reads:

> for any person engaged in the business of repairing, servicing, selling, leasing, or trading motor vehicles or motor vehicle engines, or who operates a fleet of motor vehicles, knowingly to remove or render inoperative any device or element of design installed on or in a motor vehicle or motor vehicle engine in compliance with regulations under this subchapter following its sale and delivery to the ultimate purchaser.

Id. § 7522(a)(3)(B). Ced's, along with everyone else, is clearly prohibited by section 203(a) from causing any act described in subsection (3)(B). Compliance with this prohibition is a requirement of the Act; therefore, Ced's is subject to a requirement of the Act.

Ced's argues that it is not subject to section 203(a) because the manufacturing of Test Tubes does not constitute causing an act prohibited by section 203(a)(3)(B). Test

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[3] *continued*
The parenthetical exception for certain manufacturers is irrelevant in the present context, and we shall not take further notice of it. In addition, we think that the phrase "with respect to a provision of subchapter II of this chapter" has been misplaced in the Code. According to the technical amendment that directed its insertion, it should appear after "208" (7542 in the Code), i.e., within the parentheses. *See* Pub. L. 95-190, 91 Stat. 1400 (1977). We thus omit the phrase in our discussion.

[4] Although the district court did not address itself to this issue in its memorandum opinion of July 1, Ced's raised it in proceedings before the district court, and both parties have discussed it in their briefs to this court. Accordingly, we consider it here.

Tubes, Ced's contends, have perfectly legal uses; not every use violates that prohibition. Test Tubes can be permanently installed by automobile owners on their own cars and by automobile repairmen temporarily for the purpose of verifying the need to replace the catalytic converter, all without violating any prohibition of the Act. The mere fact that Ced's manufactures and sells Test Tubes thus does not permit the inference that it is causing anyone to install a Test Tube unlawfully. This argument fails because it confuses being subject to the Act with being in violation of the Act. Ced's is subject to the Act because the Act prohibits Ced's from causing an act prohibited in section 203(a)(3)(B); whether Ced's has actually caused such a prohibited act, or whether there is even probable cause to think that Ced's has done so, is not pertinent.

Ced's argues further that the prohibition against causing an act prohibited in section 203(a)(3)(B) applies only to the persons identified in that section: any person engaged in the business of repairing, servicing, selling, leasing, or trading motor vehicles or motor vehicle engines, or who operates a fleet of motor vehicles. It is clear that the prohibition against knowingly removing antipollution devices or rendering them inoperative applies only to persons in the identified class. But the wording of the statute gives no reason to suppose that the prohibition against *causing* such a prohibited act applies only to persons in the same class. Congress could have written in such a restriction, but it did not, and we decline to supply it here.

Ced's argues finally that Congress has recognized that Ced's does not presently fall within the "causing" provision of section 203(a), because the proposed Clean Air Act Amendments of 1982 made Ced's expressly subject to section 203(a).[5] But the fact that proposed legislation

[5] According to the proposed amendment, section 203(a)(3) was to be supplemented with the following prohibition:

(Footnote continued on following page)

introduces new prohibitions to which Ced's would be subject does not tend in the slightest to show that Ced's was in no way covered by the existing prohibitions.

There is support in the legislative history of the Clean Air Act Amendments of 1977 for the conclusion that Ced's is subject to the requirements of the Act. The 1977 amendments added to the class of persons covered by section 114(a) all persons subject to any requirement of the Act. *See infra* pp. 12-13. The Conference Report explained the effect of the revisions to section 114(a) as follows:

> [T]he conference agreement permits the Administrator to enter, inspect, test, or require testing on the premises [sic: of] any person other than a new motor vehicle manufacturer in order to carry out and enforce the requirements of this Act. This authority would apply to persons not previously covered by section 114, including but not limited to fuel additive manufacturers, independent garages, service stations, *auto parts makers*, and refineries. It may be used for the purpose of assuring compliance with any requirement of the Act (including, but not limited to, vapor recovery, transportation control, air quality maintenance plan measures, *anti-tampering prohibi-*

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[5] *continued*

> (C) for any person to sell, or offer to sell, any part or component intended for use with, or as part of, any motor vehicle, where such person knows, or reasonably should have known, that the principal use of such part or component will be to render inoperative or alter so as to cause a vehicle or engine to exceed applicable emission standards any part or component (including any replacement part or component) placed on or in a motor vehicle or motor vehicle engine for the purpose of controlling emissions in compliance with regulations under this title . . . .

House Subcomm. on Health and the Environment, 97th Cong., 2d Sess., Draft of Clean Air Act Reauthorization Amendments of 1982 at 81-82 (Comm. Print 1982).

> *tions*, MMT restrictions) which does not pertain to new motor vehicle manufacturers.

Clean Air Conference Report (1977): Statement of Intent; Clarification of Select Provisions, *reprinted in* 123 Cong. Rec. 27070 (1977) (emphasis added). This passage shows that the Conference Committee regarded auto parts makers as among the persons covered by the revised section 114 and that the authority granted to the EPA could be used to assure compliance with anti-tampering prohibitions.

Accordingly, we hold that Ced's is subject to a requirement of the Clean Air Act, so as to bring it within the class of persons subject to the authority granted to the EPA in section 114(a).

B

In its memorandum opinion of July 1, the district court found that the EPA had no statutory authority under section 114(a) of the Act to inspect and copy Ced's business records, because it had never required Ced's to keep any records. "[T]he Administrator's authority to enter, inspect and copy in § 114(a)(2) applies only when the Administrator has required the person to establish and maintain records pursuant to its authority under § 114(a)(1)." Memorandum Opinion of July 1, 1983, at 4. The court reached this result by analysis of the language of section 114(a). It noted that section 114(a)(1) "authorizes the Administrator to require any person who is subject to any requirement of the Act to establish and maintain such records as the Administrator may require for the purpose of carrying out any provision of the Act." *Id.* It noted further that section 114(a)(2) "authorizes the Administrator to enter the premises of 'such persons' and have access to and copy such records."[6] *Id.* The court inferred that

[6] The statute actually says "any records," not "such records." The full text of § 114(a)(2) reads:

(Footnote continued on following page)

"such persons" refers to persons required to keep records under section 114(a)(1). From this, and from the fact that subsection 114(a)(1) and 114(a)(2) are connected by "and," the court concluded that the EPA has authority to inspect and copy documents only of persons it has previously required to establish and maintain records. *Id.*

The EPA contends that the district court erred in identifying the antecedent of "such persons" in section 114(a)(2)(A). It maintains that "such persons" refers to persons who own or operate any emission source or who are subject to any requirement of the Act. Because Ced's is subject to a requirement of the Act, the EPA reasons, the EPA is authorized by section 114(a)(2)(A) to have a right of entry to Ced's premises and by section 114(a)(2)(B) to have access to and copy any of Ced's records.

There is neither any useful legislative history nor any published decision on this particular issue. Accordingly, our analysis will focus on the language of the statute. We think that section 114(a)(1) identifies a certain composite class of persons—those who own or operate emission sources or who are subject to any requirement of the Act—and authorizes the Administrator to require any person in that class to do any or all of the five things enumerated. We think that the phrase "such person" in section 114(a)(2)(A) means "any person in the class previously identified"—those who own or operate emission

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[6] *continued*

(2) the Administrator or his authorized representative, upon presentation of his credentials—

(A) shall have a right of entry to, upon, or through any premises of such person or in which any records required to be maintained under paragraph (1) of this section are located, and

(B) may at reasonable times have access to and copy any records, inspect any monitoring equipment or method required under paragraph (1), and sample any emissions which such person is required to sample under paragraph (1).

sources or who are subject to any requirement of the Act. This is the natural reading of the language. As it appears from the grammatical structure alone, the intent of section 114(a) is to give the EPA authority over a certain class of persons. Subsection (1) gives the EPA authority to require any person in the class to do certain things; subsection (2) gives it authority to do certain things to any person in the class. There are two subsections because two different kinds of authority are granted: the authority to require someone else to do something, and the authority to do something itself. But the class of persons over which the authority is granted is the same in both subsections—those persons who own or operate emission sources or who are subject to any requirement of the Act. There is nothing to indicate that the class over whom authority is granted in subsection (2) is limited to those over whom the EPA has exercised the authority granted in subsection (1). As we read section 114(a), subsection (1) and subsection (2) are independent and coordinate grants of authority over the same class of persons. Our grammatical analysis of section 114(a) thus inclines us to agree with the EPA's reading and to disagree with the reading of the district court.

Our interpretation gains additional support from a comparison of the language of section 114(a) before the 1977 amendments with the language after. Before 1977 section 114(a)(1) began as follows:

> The Administrator may require the owner or operator of any emission source to (A) . . . .

42 U.S.C. § 1857c-9(A)(1) (1976). Section 114(a)(2)(A) gave the Administrator

> a right of entry to, upon, or through any premises *in which an emission source is located* or in which any records required to be maintained under paragraph (1) of this section are located . . . .

Id. § 1857c-9(a)(2)(A) (emphasis added). It appears clear from this language that the right of entry applied to *any*

emission source, not just those whose owners or operators had been required to do something under section 114(a)(1).

The 1977 Clean Air Act Amendments changed section 114(a)(1) to begin:

> The Administrator may require any person who owns or operates any emission source or who is subject to any requirement of this Act . . . .

Pub. L. No. 95-95, 91 Stat. 776 (1977); Pub. L. 95-190, 91 Stat. 1400 (1977) (technical amendment) (codified as amended at 42 U.S.C. § 7414(a) (1982)). Section 114(a)(2)(A) was amended to read:

> a right of entry to, upon, or through any premises *of such person* or in which any records required to be maintained under paragraph (1) of this section are located . . . .

Id. (emphasis added).

It seems evident to us that the effect of these changes was to expand the class of persons whom the Administrator can require to do certain things and to expand correspondingly the class of premises to which the Administrator has a right of entry, so as to include all the premises of all the persons in the expanded class. Before 1977, the Administrator could require the owners and operators of emission sources to do various things and had a right of entry to premises where any emission sources were located. After 1977, the Administrator can require the owners and operators of emission sources as well as any person who is subject to a requirement of the Act to do the same things, and he has a right of entry to the premises of such persons—the owners and operators of emission sources and those who are subject to a requirement of the Act. The substitution of "of such persons" for "in which an emission source is located" in section 114(a)(2)(A) provides no basis for imputing to Congress an intent to create a new restriction on the right of entry to include only the premises of persons whom the Ad-

ministrator has required to do something under section 114(a)(1), where no such restriction was present before.

Accordingly, we hold that the phrase "such persons" in section 114(a)(2)(A) refers to any person who owns or operates any emission source or who is subject to any requirement of the Clean Air Act, whether or not the Administrator has exercised his authority under section 114(a)(1) with respect to the person in question. The district court's interpretation is therefore erroneous.

C

Ced's argues finally that the EPA has not required Ced's to maintain any records, whereas section 114(a)(2)(B) permits the EPA to have access to and copy only records that it has previously required Ced's to maintain under section 114(a)(1).[7] We find no basis for this restrictive interpretation. We think that the plain language of the Act authorizes the EPA to copy any records of any person subject to any requirement of the Act, whether or not it has previously required the person to maintain records under the authority granted in section 114(a)(1).

Section 114(a)(2)(B) authorizes three distinct actions. The Administrator may at reasonable times

—have access to and copy any records;

—inspect any monitoring equipment or method *required under paragraph (1)*;

—sample any emissions which such person is *required to sample under paragraph (1)*.

42 U.S.C. § 7414(a)(2)(B) (emphasis added). The latter two authorizations are expressly restricted to matters required under section 114(a)(1). There is no such restriction on the records that may be copied. When two items of a three-item coordinate list are made expressly subject to the

[7] *See supra* note 4.

same restriction but the third item is not, it is strong evidence of legislative intent not to apply the restriction to the third item.

Our conclusion is further supported by the language of the preceding subsection, which gives the Administrator "a right of entry to, upon, or through any premises of such person or in which *any records required to be maintained under paragraph (1) of this section* are located." 42 U.S.C. § 7414(a)(2)(A) (emphasis added). The inclusion of the restriction on "any records" in subsection (2)(A) is further evidence that the exclusion of it in subsection (2)(B) was intentional. If Congress had intended the records referred to in subsection (2)(B) to be confined to records required to be maintained under section 114(a)(1), it could easily have done so by appending to "any records" the phrase "required to be maintained under paragraph (1)," as it had done in the immediately preceding subsection, or by simply putting "such" in place of "any."

Ced's reading of section 114(a)(2)(B) not only conflicts with the plain language of the statute but also imposes on the EPA an arbitrary and meaningless requirement. In order to have access to and copy any records kept in the ordinary course of business, the EPA would first have to direct the business to maintain them. The function served by a direction to maintain records that are already kept in the ordinary course of business is obscure. We will not interpret a statute to require a meaningless act as a condition of authority if a more plausible interpretation is available. We hold that Congress, in enacting section 114(a)(1), intended to give the EPA authority to require certain persons to keep certain records not already kept in the ordinary course of business, and in enacting section 114(a)(2)(B) intended to permit the EPA to have access to and copy *any* of the records of such persons, including those previously required to be kept under section 114(a)(1) and those already kept in the ordinary course of business.

IV

In support of its grant of a permanent injunction against the EPA, the district court found that Ced's would suffer irreparable injury if the EPA carried out its announced intention of contacting Ced's customers. While the parties vigorously argued the issue of irreparable harm in their briefs, we need not reach that issue here. One of the requirements for a permanent injunction is that the plaintiff must have succeeded on the merits of its claim. *Philadelphia Welfare Rights Organization v. O'Bannon*, 525 F. Supp. 1055, 1057 (E.D. Pa. 1981); *Sierra Club v. Alexander*, 484 F. Supp. 455, 471 (N.D.N.Y.), *aff'd mem.*, 633 F.2d 206 (2d Cir. 1980). In this case Ced's has not succeeded on the merits, because it has failed to establish any unlawful act on the part of the EPA. Accordingly, the order of the district court granting a permanent injunction against the EPA is reversed and the case is remanded to the district court with instructions to dissolve the injunction and dismiss the complaint.

REVERSED AND REMANDED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

EXHIBIT D

UNITED STATES DISTRICT COURT,

Northern District of Illinois

Eastern Division

Name of Presiding Judge, Honorable John A. Nordberg

Cause No. 83 C 2409 Date Nov. 1, 1983

Title of Cause: CED'S INC. etc. v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY et al.

Brief Statement of Motion: SUPPLEMENTAL MEMORANDUM OPINION AND ORDER

The rules of this court require counsel to furnish the names of all parties entitled to notice of the entry of an order and the names and addresses of their attorneys. Please do this immediately below (separate lists may be appended).

Names and Addresses of moving counsel: _____

Representing: _____

Names and Addresses of other counsel entitled to notice and names of parties they represent: _____

Reserve space below for notations by minute clerk

Enter supplemental memorandum opinion and order amending memorandum opinion and order of July 1, 1983 and denying defendant's motion to stay pending appeal. (DRAFT)

IN THE UNITED STATES DISTRICT COURT

For the Northern District of Illinois

Eastern Division

CED'S INC., d/b/a PRODUCTS FOR POWER,

Plaintiff,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and LEE THOMAS, Acting Administrator, United States Environmental Protection Agency,

Defendants.

No. 83 C 2409

John A. Nordberg
District Judge

SUPPLEMENTAL MEMORANDUM OPINION AND ORDER

This action is before the court on motion of United States Environmental Protection Agency ("EPA") for a stay pending appeal of an injunction order issued against EPA on July 1, 1983. Before addressing the merits of EPA's motion for a stay, however, some matters raised after issuance of the injunction in open court and in EPA's motion for a stay concerning the court's initial order of injunction warrant additional discussion. The court therefore amends its Memorandum Opinion and Order of July 1, 1983 with the following:

I. Section 114 and Section 203 of the Clean Air Act

First, EPA has asserted in its motion that the court's interpretation of Section 114 of the Clean Air Act, 42 U.S.C. § 7414, in the July 1, 1983 Memorandum, ignores the plain language of Section 114. Section 114 provides in pertinent part:

> (1) The Administrator may require any person . . . who is subject to the requirement of this Chapter . . . with respect to a provision of Subchapter II of this Chapter to (A) establish and maintain such records . . . and (E) provide such other information as he may reasonably require; and
>
> (2) the Administrator . . . (A) shall have a right of entry to . . . any premises of such person . . . and (B) may at reasonable times have access to and copy any records . . .

EPA argues that the term "such person" as used in § 114(a)(2)(A) refers only to the phrase "any person who is subject to any requirement of this Chapter," even if that "person" has not been required to keep records or provide information under § 114(a)(1). Thus, it is EPA's position that it may enter the premises of any person who may be subject to the Chapter at any time and seize their books and records without prior notice, regulation or requests for information.

However, EPA's interpretation does not comport with the actual limiting language of § 114(a)(1). Section 114(a)(1) provides that "such persons" means "any person . . . subject to any requirement of this Chapter . . . [who is required] to (A) establish and maintain such records . . . and (E) provide such other information as he [the Administrator] may reasonably require." By its interpretation, EPA seeks to edit out of the statute the language limiting the term "any person." In the July 1, 1983 Memorandum, the court rejected EPA's interpretation of § 114, and found that the term "such persons" refers to persons the Administrator may require to establish and maintain records and provide such other information as he may reasonably require under § 114(a)(1). The court therefore concluded that EPA could not enter and inspect under § 114(a)(2) without some type of prior regulation or request for information. The court adheres to its initial interpretation of §114.

However, even if EPA were correct—that the term "such person" refers to any person subject to any provisions of the Chapter—§ 114(a) still does not provide authority for EPA's action, because CED's was not a person "subject to" any requirement of the Chapter. EPA has asserted that CED's is "subject to" § 203 of the Chapter, 42 U.S.C. § 7522, because it allegedly "causes" violations of § 203 by manufacturing test tubes knowing they will be used in a manner prohibited in § 203. Section 203 is a peculiar statute in that it only prohibits the replacement of catalytic converters by certain specified persons, such as car manufacturers and car repair shops. The statute does not prohibit the manufacture or sale of test tubes, and, more importantly, it does not prohibit individual car owners from purchasing test tubes and permanently replacing the catalytic converters on their own cars with the devices. In addition, car repair shops can legally install the devices on a temporary basis for testing and repair purposes. Thus, all the devices manufactured and sold by CED's could legally be purchased and used by individual car owners and by car repair shops acting in compliance with the law. Since the statute permits such widespread use of the device, CED's cannot be said to be "causing" violations of § 203 merely by manufacturing and selling the devices.

Moreover, the term "causing" in § 203 must be interpreted in accordance with the intent of Congress, and the plain language of this section clearly prohibits only *specified persons* from *installing* the devices. To interpret the term "causing" to expand the persons liable for violations under the narrowly drawn statute far beyond the persons specified in § 203 would run contrary to the manifest intent of Congress. Congress could not have intended to impose liability on persons through such a circuitous "back door" route. Congress could have prohibited the manufacture and sale of the test tubes, and it could have prohibited the installation of the devices on a permanent basis by *any* person, but instead Congress chose to limit the statute's

application to car manufacturers and certain other specified persons. These specifically limited prohibitions in the statute evince a clear Congressional intent not to include manufacturers of the devices or individual car owners in the proscription. The court therefore will not interpret the term "causing" in § 203 to include these persons in direct contravention of the intent of Congress.[1]

Accordingly, the court concludes that CED's does not "cause" violations of § 203 merely by manufacturing and selling test tubes. Since EPA has not argued that CED's has directly violated § 203 or any other provision of the Clean Air Act, CED's is not a "person subject to any requirement of the Chapter."[2] Therefore, even under EPA's interpretation of the term "such persons" in § 114, this section does not provide a statutory basis for EPA's seizure of CED's records.[3]

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[1] Interestingly, EPA has stated that it supports an amendment of § 203 presently under consideration by Congress which would prohibit the manufacture and sale of test tubes. EPA thus apparently admits indirectly that amendment of § 203 is necessary to reach test tube manufacturers like CED's, yet they ask this court to hold that § 203 in its present form already prohibits the manufacture and sale of test tubes.

[2] To the extent that this analysis may be considered to be inconsistent with the court's statement in the July 1, 1983 Memorandum that EPA perhaps could have required CED's to produce the seized records under § 114 if it had followed the appropriate procedures, that opinion is modified to be consistent with this opinion.

[3] EPA also asserted in its brief that the court's interpretation of § 114 "creates a significant anomaly in the statute" by prohibiting EPA from inspecting records it could require CED's to produce without a warrant under § 114(a)(1)(E). Since the court has concluded that CED's is not subject to § 203 of the Act, § 114(a)(1)(E) cannot provide a statutory basis for EPA's seizure. However, even if CED's were subject to § 203, § 114 is not applicable in this case. Section 114(a)(1) grants the Administrator power to require any person who is subject to any requirement of the Act to provide specified types of information, including, under subsection

Footnote continued on following page.

II. Irreparable Harm

EPA has also objected to the court's finding of irreparable harm, arguing that it was based solely on a finding of harm to CED's business and that there is no evidence in the record to support this finding. Because the court's determination of irreparable harm in the July 1, 1983 Memorandum was made in the context of applying the factors to be weighed in exercising equitable jurisdiction, a clarification is in order. The court's finding of irreparable harm in this case was based both on the obvious harm to CED's business from EPA's actions and on EPA's violation of CED's Fourth Amendment rights. EPA acted without statutory authority in entering CED's premises and seizing its business records. It has not been disputed that CED's has a reasonable expectation of privacy in its internal business records stored in its offices. By seizing and copying these records without statutory or other authority, EPA has clearly made an unreasonable search in violation of CED's Fourth Amendment rights.[4] This finding of constitutional viola-

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Footnote continued from preceding page.

(E), "such other information as he may reasonably require." In this case, however, EPA has not "reasonably required" CED's to produce anything, either by regulation or by less formal means. EPA made no requests of any kind for information from CED's. EPA simply obtained a warrant, entered CED's property and seized its records. It is clear from the plain language of § 114(a)(1)(E) that EPA must make a "reasonable request" to lawfully obtain information under this subsection. Since EPA made no such "reasonable request," EPA cannot rely on § 114(a)(1) to justify its seizure of CED's records. EPA's argument that the court's interpretation of § 114(a) creates an anomaly in the statute is therefore without merit.

[4] The court notes that CED's is not part of a highly regulated industry in which administrative searches without warrants may be reasonable. *See. e.g., Donavan v. Dewey,* 452 U.S. 594, 101 S.Ct. 2534 (1981); *Marshall v. Barlows, Inc.,* 436 U.S. 307, 98 S.Ct. 1816 (1978). In fact, CED's had not been regulated in any way by EPA prior to the April 6, 1983 seizure of CED's records.

tion was implicit in the court's discussion of the equitable factors justifying exercise of the court's equitable jurisdiction to enter an injunction. The use of this illegally seized information alone is sufficient to constitute irreparable harm, and this constitutional harm, combined with the harm to CED's business from EPA's use of the records, clearly justifies issuance of an injunction.

EPA has argued that there is no evidence in the record to support a finding of harm to CED's business. The court first notes that, although it offered to hear testimony from CED's officers or the Government at two hearings on this matter, both parties declined to present such testimony. CED's took the position that the constitutional violation alone established irreparable harm *per se*. In a hearing on July 22, 1983, EPA concurred with CED's that, if constitutional harm were found, there would be irreparable harm *per se* and thus no need for specific factual findings. Based on this statement, the court did not require additional testimony on this point. Since the court has found that CED's suffered constitutional harm from EPA's illegal search and seizure, EPA's objection that there is no evidence in the record of harm to CED's business is no longer viable.[5] In any event, however, in view of the nature of CED's business, and based on EPA's statement that it plans to use the information seized to contact CED's customers and the verified allegations of the complaint, the court reasonably concluded

[5] EPA's objection that it was improperly denied the opportunity to file a written answer and thereby created an issue of fact on the question of irreparable harm is not well taken. EPA agreed to handle this matter as a motion for permanent injunction so that the legal issues involved could be finally resolved expeditiously. The court has attempted to create as complete a record as possible for any appeal, and has granted both parties numerous opportunities to supplement the record so that a final determination could be made by this court, and, if necessary, by the Court of Appeals. In any event, since the court has found that CED's Fourth Amendment rights were violated by EPA, and that this violation alone constitutes irreparable harm, EPA's objection is obviated.

that CED's business will suffer irreparable harm from EPA contact with its customers. The court therefore adheres to its finding of irreparable harm, based both on EPA's violation of CED's Fourth Amendment rights, and on the harm which would be caused to CED's business by EPA's intended use of the illegally seized materials.[6]

MOTION FOR STAY PENDING APPEAL

EPA has moved for a stay of the injunction pending appeal. In deciding a motion for a stay pending appeal, the court must consider: (1) whether the appellant has made a showing of likelihood of success on appeal, (2) whether appellant has demonstrated a likelihood of irreparable injury absent a stay, (3) whether a stay would substantially harm other parties to the litigation, and (4) where the public interest lies. *Adams v. Walker,* 488 F.2d 1064 (7th Cir. 1973).

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[6] The recent decision in *Mobil Oil Corporation v. United States Environmental Protection Agency,* No. 83-1047 (September 14, 1983), has been cited to the court as analogous to this action. However, the *Mobil* case is readily distinguished from this case on the basis of the facts and the law applied. Under the regulatory scheme created under the Clean Water Act, Mobil Oil had sought and was granted a permit to discharge certain pollutants into a river. Section 308 of the Clean Water Act, 33 U.S.C. § 3138, specifically authorizes EPA to enter any premises in which an effluent source is located and sample any effluents which the owner is required to sample under the Act. Unlike CED's in the instant action, Mobil was unquestionably subject to the Act, having applied for and been issued a permit to discharge pollutants. Further, § 308 explicitly authorized the entry onto Mobil's premises and the sampling of effluents. As noted by the court, there was no question that EPA had the right to enter Mobil's refinery; the only question was, once EPA entered the premises, did it have the power to collect samples of *untreated* wastes. The decision does not provide any guidance for resolving the issues in this case of whether § 114 of the Clean Air Act authorizes entry and seizure without prior regulation or notification, and whether CED's is subject to § 203 of the Act.

EPA has failed to demonstrate that a stay pending appeal is appropriate in this case. First, based on the discussion above and in the July 1, 1983 Memorandum, the court finds that there is not a substantial likelihood that EPA will succeed on appeal. Second, EPA has not shown that it will be irreparably harmed if a stay is not granted. If EPA succeeds on appeal, its investigation will merely have been delayed. Moreover, the limited injunction issued by the court limits only EPA's use of the illegally seized records; it does not prevent EPA from using all legal means available to it to continue its investigation. Third, as discussed above and in the July 1, 1983 Memorandum, the use of the information seized by EPA will cause substantial harm to CED's business. Finally, the public interest is well-served when government agencies are prevented from using materials seized in violation of their empowering statutes and the Constitution. The court therefore denies EPA's motion for a stay, except that: by agreement of both parties, EPA need not return to CED's the copies of CED's records pending appeal, and these documents may not be used in any way by EPA or any other government body during the pendency of the appeal.

ENTER:

/s/ JOHN A. NORDBERG
John A. Nordberg
United States District Judge

DATED: November 1, 1983.

EXHIBIT E

UNITED STATES DISTRICT COURT,

Northern District of Illinois

Eastern Division

Name of Presiding Judge, Honorable John A. Nordberg

Cause No. 83 C 2409 Date July 1, 1983

Title of Cause: CED'S INC. v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Brief Statement of Motion: MEMORANDUM OPINION AND ORDER

The rules of this court require counsel to furnish the names of all parties entitled to notice of the entry of an order and the names and addresses of their attorney. Please do this immediately below (separate lists may be appended).

Names and Addresses of moving counsel: _____

Representing: _____

Names and Addresses of other counsel entitled to notice and names of parties they represent: _____

Reserve space below for notations by minute clerk

Enter memorandum opinion and order. (DRAFT) Defendant's motion to dismiss is denied, and plaintiff's motion for a permanent injunction is granted.

Nordberg, J. /s/

IN THE UNITED STATES DISTRICT COURT

For the Northern District of Illinois

Eastern Division

CED'S, INC., d/b/a PRODUCTS FOR POWER

Plaintiff,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and LEE THOMAS, Acting Administrator, United States Environmental Protection Agency,

Defendants.

No. 83 C 2409

John A. Nordberg
District Judge

MEMORANDUM OPINION AND ORDER

This action is before the court on motion of plaintiff for a permanent injunction, and on motion of defendant to dismiss plaintiff's complaint. For the reasons set forth below, defendant's motion to dismiss is denied, and plaintiff's motion for a permanent injunction is granted.

Facts

CED'S, Inc. ("CED'S"), the plaintiff in this action, filed its complaint for injunctive relief on April 7, 1983 to enjoin the defendant, the United States Environmental Protection Agency ("EPA"), from executing, or using any information obtained through the execution of, a civil inspection warrant issued by a United States Magistrate. Plaintiff also filed, concurrently with

the complaint for injunctive relief, a notice of appeal from the Magistrate's denial of plaintiff's motion to quash the administrative warrant. The complaint for injunction relief and the appeal of the Magistrate's decision were consolidated before this court.

CED'S operates a manufacturing facility in Addison, Illinois, at which a product known as a "Test Tube" is manufactured and sold. The test tube is a device which can be installed in the exhaust system of automobiles to replace catalytic converters, for testing and other purposes. CED'S sells test tubes primarily to warehouse distributors, not to retailers or the general public. The test tubes are marketed nationally by CED'S, and are sold in every state except California, where sale of the device is prohibited.[1]

On April 5, 1983, EPA filed an application for an administrative warrant with a United States Magistrate in this judicial district. The magistrate issued the civil inspection warrant authorizing a complete inspection of CED'S facility, including the review and copying of virtually all of CED'S business records. On April 6, 1983, EPA agents entered CED'S facility pursuant to the warrant, and examined, inspected, and copied the documents specified in the warrant. As the inspection was being carried out, CED'S filed with the magistrate a motion to quash the warrant. After a hearing that day, CED'S motion to quash was denied by the magistrate.

On April 7, 1983, CED'S filed its complaint for injunctive relief and the notice of appeal of the magistrate's order with this court. An emergency hearing was held that day by this

[1] It is important to note that the sale of test tubes can be for entirely legitimate purposes under § 203 of the Clean Air Act, 42 U.S.C. § 7522, as the EPA admits in their memorandum. While § 203 prohibits automobile manufacturers and automobile repair shops from permanently replacing catalytic converters with test tubes, current federal legislation does not prohibit individuals from installing the devices permanently on their own automobiles. Therefore, the manufacture and sale of test tubes are not prohibited under the Act.

court on plaintiff's motion for a temporary restraining order and preliminary injunction. Defendant filed a motion to dismiss the complaint immediately before the hearing. No ruling was made on either motion at the hearing, pending briefing of issues by the parties. An interim agreement was reached by the parties, in which EPA agreed to refrain from contacting CED'S customers, and from using the information seized other than to review, interpret and collate it.

On motion of the plaintiff, the court stated its intention at a hearing on May 6, 1983 to treat plaintiff's motion as a motion for permanent injunction, since the same basic legal question would be dispositive of both a preliminary and permanent injunction, and no purpose would be served by delaying the final decision on the merits.

MOTION FOR PERMANENT INJUNCTION

The primary issue raised by plaintiff in their complaint for injunctive relief is whether EPA has any statutory authority to inspect CED'S business records. Although it is well established that the scope of an administrative agency's investigative power is broad, *United States v. Morton Salt Co.*, 338 U.S. 632, 70 S.Ct. 357 (1950), this investigatory power is not limitless. The Fourth Amendment demands that the investigation be conducted pursuant to legitimate Congressionally authorized purposes, and that the agency must follow all the statutory procedures imposed by Congress. *United States v. Powell,* 379 U.S. 48, 57-58, 85 S.Ct. 248 (1964); *Marshall v. Chromalloy Am. Corp.*, 589 F.2d 1335, 1343 (7th Cir. 1979).

EPA bases its authority to inspect on sections 114(a) and 203(a) of the Clean Air Act, 42 U.S.C. § 7414(a), § 7522(a). Section 203(a) prohibits the removal, and the causing thereof, of pollution control devices such as catalytic converters from motor vehicles by specified persons. Section 114 of the Act allows the EPA to inspect the records of businesses in specified

circumstances to enforce other provisions of the act, such as section 203. EPA asserts that, by manufacturing and selling test tubes, CED'S may be violating § 203 by "causing" persons to remove catalytic converters from automobiles and replace them permanently with test tubes. This alleged violation of § 203, asserts EPA, permits them to inspect CED'S records under § 114(a) of the Act. CED'S argues that § 114(a)(2) gives the EPA authority to inspect business records only when it has required the businesses in question by regulation to establish and maintain such records pursuant to its authority under § 114(a)(1).

Section 114

Section 114(a)(1) authorizes the Administrator to require any person who is subject to any requirement of the Act to establish and maintain such records as the Administrator may require for the purpose of carrying out any provision of the Act. Section 114(a)(2) then authorizes the Administrator to enter the premises of "such persons" and have access to and copy such records. EPA asserts that its right to have access to and copy records under § 114(a)(2)(B) is independent of its authority to require persons to maintain and establish records under § 114(a)(1). However, it is clear from the use of the conjunctive "and" between § 114(a)(1) and § 114(a)(2), and from the specific referral in § 114(a)(2) to "such persons"—i.e., those persons required to keep records under § 114(a)(1)—that the Administrator's authority to enter, inspect and copy in § 114(a)(2) applies only when the Administrator has required the person to establish and maintain records pursuant to its authority under § 114(a)(1).

Although EPA perhaps could have taken action to require CED'S to maintain and establish records under § 114(a), EPA has clearly failed to do so. Therefore, EPA has no authority under § 114(a) to enter and inspect the records of CED'S. Since EPA has not based its inspection of CED'S records on any

other statutory or other authority, and the court has not uncovered any other authority for EPA's action, the court must conclude that EPA has exceeded the scope of its authority under the Act by seizing the business records of CED'S.

It should be noted, however, that the court's interpretation of § 114 does not in any way prohibit EPA from taking future action with regard to CED's pursuant to § 114 or other provisions of the Act. EPA is merely prohibited from sidestepping the Congressionally imposed requirements in § 114 for exercising its power to enter and inspect records.

Equitable Jurisdiction

Having found that an administrative agency has unlawfully seized property, a district court has inherent power under its "equitable jurisdiction" to order the return of the property, even though no regulatory, enforcement or prosecutorial action has been filed. *Mr. Lucky Messenger Service, Inc. v. United States,* 587 F.2d 15 (7th Cir. 1978); *Hunsucker v. Phinney,* 497 F.2d 29 (5th Cir. 1974), *cert. denied,* 420 U.S. 927 (1975); *Richey v. Smith,* 515 F.2d 1239 (5th Cir. 1975). Although it is not often invoked, courts have discretion to exercise this jurisdiction after balancing equitable considerations. *Id.*

In this case, equitable factors weigh heavily in favor of exercising the court's equitable jurisdiction to enjoin EPA. First, the court finds that CED'S will be irreparably harmed by EPA's use of the illegally seized information. EPA has announced its intention to contact CED'S customers. This action will undoubtedly result of necessity in intimidation of customers, loss of sales, and damage to CED'S goodwill, causing serious and irreparable damage to CED'S business.[2]

[2] As noted above, § 203 of the Act does not prohibit the manufacture and sale of test tubes, and it does not prohibit individuals from permanently replacing catalytic converters on their own automobiles with these devices. Thus, CED's manufacture and sale of test tubes can be for entirely legal purposes under the Act.

Further, CED'S has no adequate remedy at law. The injury to its business caused by EPA contacting customers would be irreversible, and would be almost impossible to calculate in monetary terms.

In addition, there is an important public interest in preventing governmental enforcement agencies from overstepping their authority and intruding on the important constitutional right to be free from unreasonable searches and seizures, a right extended to include commercial buildings as well as private buildings. *Marshall v. Barlows,* 436 U.S. 307, 98 S.Ct. 1816 (1978). It is in the public interest to require federal agencies to follow Congressionally mandated procedures for exercising their powers, particularly when those powers, once properly invoked, have been construed very broadly. EPA's ability to enforce the Clean Air Act, and thereby further the public interest in protecting the environment, is not thwarted by the court's limited ruling in this case. The EPA is free to follow the prescribed procedures of § 114 of the Act, or to attempt to enforce § 203 directly through its powers under § 204, 42 U.S.C. § 7523.

On balance, the court finds that exercise of its equitable jurisdiction to order injunctive relief is appropriate. The court therefore grants plaintiff's motion for permanent injunction, and for the same reasons, denies defendant's motion to dismiss. Accordingly, the court orders as follows:

ORDER OF PERMANENT INJUNCTION

IT IS ORDERED, based on the above-stated findings, that:

1. The United States Environmental Protection Agency ("EPA"), and all those in active concert or participation with EPA, are hereby enjoined and restrained from any use of materials obtained from CED'S, Inc. ("CED'S") through execution of the administrative warrant issued April 5, 1983.

2. EPA is ordered to return to CED'S all such materials, including any copies made therefrom, obtained from CED'S through execution of the administrative warrant.

ENTER:

/s/ JOHN A. NORDBERG
John A. Nordberg
District Judge

Dated: July 1, 1983

EXHIBIT F

Filed in Clerk's Office
U.S.D.C.—Atlanta
Sep 21, 1983
Ben H. Carter, Clerk
By:
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF GEORGIA

ATLANTA DIVISION

NATIONAL MUFFLER MANUFACTURING COMPANY, INC.,
Plaintiff,

vs.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Defendant.

Civil Action
No. C83-929A

ORDER

This action, involving allegations of violations of plaintiff's rights under the Fourth Amendment to the United States Constitution, is before the court on plaintiff's motion for a preliminary injunction and motion for a temporary restraining order. A hearing was held on these motions on May 13, 1983. For the reasons set forth below, plaintiff's motions for a preliminary injunction and temporary restraining order are DENIED.

I.

Plaintiff produces engine and exhaust system parts for automobiles. One of the products produced by plaintiff is a line of testing pipes used to test the efficiency of catalytic converters. The catalytic converter is the primary emission control device used by automobile manufacturers to assure that new cars meet exhaust emission standards imposed by the Clean Air Act. Since the converter is a "device or element of design" installed in a motor vehicle in compliance with regulations under Title II of the Clean Air Act, causing the removal of a converter and/or its replacement with a testing pipe is a violation of Section 203(a)(3)(B) of the Clean Air Act, 42 U.S.C. § 7522(a)-(3)(B). Plaintiff does not install the testing pipes, but rather manufactures and sells them to various retail businesses.

On or about April 5, 1983, defendant entered onto plaintiff's premises, searched the premises, and seized several documents. The search and seizure was undertaken pursuant to a warrant and continued for several days.

The magistrate issued the administrative search warrant pursuant to 42 U.S.C. §§ 7414(a), 7522(a), stating that probable cause existed for the issuance of the warrant for the entry, inspection, collection, and copying of information and records at plaintiff's premises. The warrant specified that access was to be directed to records showing or relating to the marketing, sale, or distribution of testing pipes and other catalytic converter replacement pipes during the period from January 1, 1979, through December 31, 1982. It also provided that in the event that any records are copied off the plaintiff's premises, such records shall be properly receipted for and returned within 72 hours after removal from the premises. Finally, the warrant indicated that the duration of the inspection was not to exceed ten days.

Plaintiff alleges that defendant is using the information from the search of its premises and seizure of its documents by contacting its customers and prospective customers, suggesting to them that plaintiff is engaged in criminal activity, threatening them with criminal prosecution, and offering them immunity from such prosecution in return for testimony against plaintiff. Plaintiff contends that as a result of defendant's conduct, it has suffered loss of business and damage to its reputation and good name.

In its motion for a preliminary injunction and temporary restraining order, plaintiff argues that it is not subject to the provisions of the Clean Air Act specified in the administrative search warrant, and therefore the search of its premises and seizure of its documents was without statutory authority in violation of its fourth amendment rights. Plaintiff contends that defendant should be enjoined from making any use of any records obtained by means of the warrant. Specifically, plaintiff seeks injunctive relief that defendant be enjoined from the following: (a) entering plaintiff's premises for the purpose of inspecting, collecting, photographing, or copying materials, documents, or papers regarding testing pipes; (b) using, retaining, copying, or transmitting any portion of plaintiff's records; (c) contacting any customer of plaintiff whose identity was learned by defendant; and (d) making untrue, disparaging, false, or misleading statements, or omitting to state a material fact necessary to make statements made not misleading, to any person who is a customer, or prospective customer, of plaintiff with respect to any communication.

II.

While the scope of an administrative agency's investigative power is broad, *see Federal Communications Commission vs. Pottsville Broadcasting Co.*, 309 U.S. 134, 142-44 (Frankfurter, J.), the fourth amendment prohibition against unreasonable

searches and seizures applies to administrative searches as well as criminal investigations. *Marshall vs. Barlow's, Inc.*, 436 U.S. 307 (1978).

The application upon which the magistrate issued the warrant in the instant case stated that there is probable cause to believe that plaintiff, through the sale, distribution, and promotion of testing pipes to automotive repair facilities, is "causing" such repair facilities to remove or render inoperative emission control devices in violation of Section 203(a)(3) of the Clean Air Act, 42 U.S.C. § 7522(a)(3). In the application, the defendant presented evidence to show that plaintiff is engaged in activities which promote the removal of catalytic converters on motor vehicles and their replacement with testing pipes. Specifically, the evidence showed the following: (1) More testing pipes are being made or manufactured than are legally needed; (2) plaintiff manufactures testing pipes and markets them aggressively, with some of the marketing containing a caveat; (3) at some time before 1980, plaintiff advocated replacing catalytic converters with testing pipes, but that type of marketing was discontinued; (4) there are possible violations of the statute by third parties; and (5) testing pipes are lawful for various vehicles.[1] On the basis of this application, Magistrate Castellani issued the warrant for the entry of plaintiff's premises and for the inspection, collection, and copying of information and records. The warrant was issued pursuant to Sections 114(a) and 203(a) of the Clean Air Act, 42 U.S.C. §§ 7414(a), 7522(a).

Section 203(a) prohibits the removal, and the causing thereof, of pollution control devices such as catalytic converters from motor vehicles by specified persons. 42 U.S.C. § 7522(a). Section 114 of the Act allows the Environmental Protection

[1] This court's review of the sufficiency of the information or evidence for the issuance of a warrant is strictly confined to that information brought to the magistrate's attention. *West Point-Pepperell, Inc. vs. Donovan*, 689 F.2d 950, 959 (11th Cir. 1982).

Agency to inspect the records of businesses in specified circumstances to enforce other provisions of the Act, such as section 203. 42 U.S.C. § 7414(a).

Defendant argues that the concept of causation is flexible and broad enough to allow plaintiff to come within the purview of section 203(a) and contends that the evidence provided to the magistrate was sufficient to create a reasonable suspicion[2] that plaintiff is causing the removal of emission control devices in violation of the Clean Air Act.

In order for the magistrate to have made such a finding of probable cause, two assumptions must have existed: (i) Through plaintiff's aggressive marketing, testing pipes are being used in an unlawful manner; and (ii) if testing pipes are being used unlawfully due to plaintiff's marketing, plaintiff is causing another to violate the law. Such an analysis is problematic, however. With removal as the prohibited activity, the court believes that a more direct cause than the furnishing of a substitute not itself unlawful is required. This is especially significant on the facts presented here where plaintiff's advocacy of unlawful replacement in trade journals is stale from an evidentiary point of view. The company's advertisements warn against use of the pipes as replacements for converters. For probable cause to exist, there must be evidence that the plaintiff either deliberately caused the removal, *see United States vs. Konofskey,* 243 U.S. 440, 443 (1917), or conducted itself in such a way as to have the inevitable effect of causing, *see Chrysler Corp. vs. United States Environmental Protection Agency,* 631 F.2d 865 (D.C. Cir. 1980), the prohibited activity —removal. In other words, irrespective of the standard this court adopts to define the meaning of "cause," the magistrate was not provided with sufficient evidence to suspect reasonably

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[2] *See West Point-Pepperell, Inc. vs. Donovan,* 689 F.2d at 957-58 (administrative probable cause, based upon specific evidence of an existing violation, must at least be shown by "a reasonable belief that a violation has been or is being committed and not upon a desire to harass the target of the inspection.").

that plaintiff is causing another to remove catalytic converters in violation of the law in light of the fact that the evidence of plaintiff's advertisements and marketing activity is stale.

Accordingly, the court concludes that the magistrate's determination that probable cause existed to issue a warrant on the basis that plaintiff was causing another to violate the law was arbitrary. *See West Point-Pepperell vs. Donovan,* 689 F.2d 950, 959 (11th Cir. 1982) (a magistrate's probable cause determination, while entitled to great deference, is not conclusive upon a showing of arbitrariness).

III.

Plaintiff argues that since the administrative search warrant is without any lawful basis, defendant should be enjoined from making any other further entry of its premises or inspection, collection, or copying of its records. Plaintiff contends that an injunction is warranted, inasmuch as: (i) It will be irreparably harmed if defendant is not enjoined by the disruption and loss of business caused by defendant's conduct, and the likelihood of further search and seizure pursuant to this unlawful warrant; (ii) plaintiff has no adequate remedy at law; and (iii) plaintiff is engaged in a lawful business and therefore harm in not granting an injunction would be great, while granting the injunction would work no hardship to defendant. It is noted that defendant has returned to plaintiff all of its original records or documents taken during the search in issue.

At the outset, it is noted that the fourth amendment protects all citizens and not merely criminal defendants. This amendment peculiarly protects privacy interests:

> The effect of the Fourth Amendment is to put the course of the United States and federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to forever secure the people, their persons, houses, papers and effects against all unreasonable searches and seizures under

> the guise of law. This protection reaches all alike, whether accused of crime or not, and the duty of giving it force and effect is obligatory upon all entrusted under our federal system with the enforcement of the laws.

Weeks vs. United States, 232 U.S. 383, 391 (1914). While these principles are axiomatic, it does not necessarily resolve the question of what remedies are available to an individual or corporation whose fourth amendment rights have been violated. While an individual is entitled to maintain a claim for damages against the officers who conducted the unlawful search, *Bivens vs. Six Unknown Federal Narcotics Agents,* 403 U.S. 388 (1971), and the individual may obtain the return of the illegally seized property, *Go-Bart Importing Co. vs. United States,* 282 U.S. 344 (1931), and the individual may obtain exclusion of unlawfully seized evidence and its "fruits" from a trial in which he is a defendant, *Mapp vs. Ohio,* 367 U.S. 643 (1961); *Wong Sun vs. United States,* 371 U.S. 471 (1963), plaintiff contends that a disruption of its privacy interests may be remedied by an injunction against defendant's further copying or using of the records illegally seized.

Initially, the court notes the proposition that once privacy is ruptured, it cannot be restored for reparation comes too late. *Linkletter vs. Walker,* 381 U.S. 618, 637 (1965). As the Supreme Court stated in *United States vs. Calandra:*

> Questions based on illegally obtained evidence are only a derivative use of the product of a past unlawful search and seizure. They work no new Fourth Amendment wrong.

414 U.S. 338, 354 (1974). Therefore, plaintiff errs in its belief that it is entitled to an injunction due to the fact that the question presented is not one of rights, but of remedies.

The only continuing interest that plaintiff can assert here is a property interest. *Compare United States vs. Hubbard,* 650 F.2d 293 (D.C. Cir. 1980) (pure privacy interests allow for injunctive relief restraining public access to documents). But,

plaintiff's original documents or records have been returned. Thus, any property interest that can be asserted is attenuated. Furthermore, no evidence has been presented that defendant is using the "fruit" of the illegal search against plaintiff. There is no allegation of an administrative or civil action against plaintiff. The defendant may use the information gained in the investigation of others who may actually be removing converters and replacing them with the pipes. There is ample evidence that some of plaintiff's customers may be doing that, but neither they nor the plaintiff may have standing to complain of this use. *See United States vs. Salvucci,* 448 U.S. 83 (1980); *Rakas vs. Illinois,* 439 U.S. 128 (1978). Simply, there is no showing of irreparable harm which would necessitate this court's utilizing its equitable powers. *See generally* 11 C. Wright & A. Miller, Federal Practice & Procedure § 2942, at 368-70 (1973); J. Moore & J. Lucas, Moore's Federal Practice ¶ 65.04[2] (2d Ed. 1982).

CONCLUSION

In summary, the court makes two conclusions. First, the court finds that there was no probable cause to believe that plaintiff was causing automotive repair facilities to remove or render inoperative emission control devices in violation of Section 203(a)(3) of the Clean Air Act, and concludes that the search and seizure pursuant to the administrative search warrant issued by Magistrate Castellani was unreasonable.

Second, as to the remedy for this fourth amendment violation, the court concludes that an injunction against defendant from making any use of any copies of any information obtained by means of the warrant is not justified. The original documents have been returned to plaintiff, and thus any court order requiring the return of illegally seized property is not necessitated. Any concern regarding the exclusion of unlawfully seized evidence and its fruits from a trial or proceeding in which plaintiff is a defendant is not an inquiry proper at this time. Any damage as a result of the illegal search and seizure is adequately provided for in a *Bivens* action. Finally, plaintiff has no standing to assert defendant's derivative use of information received from the illegal search and seizure.

IT IS SO ORDERED this 15th day of September, 1983.

/s/ J. OWEN FORRESTER
J. Owen Forrester
United States District Judge

EXHIBIT G

UNITED STATES DISTRICT COURT

Northern District of Illinois

Eastern Division

83M 155

In the Matter of: CED'S, INC. d/b/a PRODUCTS FOR POWER 25 OFFICIAL ROAD ADDISON, ILLINOIS *Respondent*	Warrant of Entry, Inspection, Collecting of Information, Taking Photographs, and Copying of Records Under the Clean Air Act

TO: THE UNITED STATES OF AMERICA, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, THROUGH ITS DULY DESIGNATED REPRESENTATIVE OR REPRESENTATIVES, THE UNITED STATES MARSHALL OR ANY OTHER FEDERAL OFFICERS:

Application having been made and Paulette B. Peltz having shown probable cause for the issuance of a warrant for entry, inspecting, collecting of information, copying of the records, and inspection and photographing of the other items described below at the premises known as Ced's, Inc. d/b/a Products for Power (hereinafter "Products for Power"), located at 25 Official Road, Addison, Illinois.

WHEREFORE, pursuant to the Clean Air Act (Act) as amended, 42 U.S.C. § 7401 *et seq.*, and the regulations thereunder, the United States of America, United States Environmental Protection Agency (EPA), through its duly authorized representative or representatives is hereby author-

ized to enter the above-described premises for the purpose of conducting an administrative inspection pursuant to sections 114(a) and 203(a), respectively. Any duly authorized Enforcement Officer of the EPA upon presentation of appropriate credentials, is authorized to have access to and inspect and copy (including copying off premises) records maintained or stored at the aforementioned location which show or relate to the marketing, sale, and/or distribution of "test tubes" and other catalytic converter replacement pipes (hereinafter referred to as "test tubes") during the period of January 1, 1979 through December 31, 1982. Said records specifically include the following regarding test tubes: 1) purchase and sales receipts, 2) billing invoices, 3) shipment invoices, 4) product distribution and customer lists, 5) mail order mailing lists, 6) current inventory and production figure documents, 7) correspondence with purchasers and potential purchasers, 8) memoranda and notes regarding telephone and other conversations with purchasers and potential purchasers, 9) advertising and marketing surveys and studies, 10) advertising and marketing materials, 11) memoranda, notes, or other documents written by company employees or other persons regarding or relating to the legality of marketing test tubes or installing such devices, and 12) documents regarding test tube test procedures.

In the event that any records are copied off the premises of Products for Power said records shall:

(1) be properly receipted for, and

(2) be returned within 72 hours after removal from the premises.

The inspection will be conducted during normal business hours, will begin as soon as practicable after issuance of this warrant, will be completed with reasonable promptness, and will otherwise be conducted in a reasonable manner.

The duration of this inspection will be of such reasonable length, but not to exceed ten (10) days, as to enable the authorized enforcement officers of EPA to satisfactorily complete such inspection pursuant to 42 U.S.C. §§ 7414(a) and 7522(a).

The United States Marshall is hereby authorized to assist the representatives of the United States Environmental Protection Agency in such a manner as may be reasonably necessary to execute this warrant and the provisions contained herein.

A copy of this warrant shall be left at the premises at the time of the inspection.

A prompt return of this warrant shall be made to this court showing that the warrant has been executed and that the inspection has been completed within such reasonable time, not to exceed ten (10) days from the date of warrant issue.

Dated: This 5th day of April 1983.

/s/ CARL B. SUSSMAN

Carl B. Sussman
United States Magistrate

EXHIBIT H

UNITED STATES DISTRICT COURT

Northern District of Illinois

Eastern Division

In the Matter of: CED'S, INC. d/b/a PRODUCTS FOR POWER 25 OFFICIAL ROAD ADDISON, ILLINOIS *Respondent*	Application for Warrant to Enter, Inspect, Collect Information, Take Photographs and Copy Records

TO: THE HONORABLE UNITED STATES DISTRICT COURT JUDGE FOR THE NORTHERN DISTRICT OF ILLINOIS

The United States of America, United States Environmental Protection Agency (hereinafter "EPA"), through the below-mentioned Assistant United States Attorney for the Northern District of Illinois, hereby applies for a warrant pursuant to sections 114 and 203(a) of the Clean Air Act (hereinafter "Act"), 42 U.S.C. § 7414 and § 7522(a), respectively, for the purpose of conducting an inspection as follows:

To enter to, through and upon the premises of Ced's, Inc. d/b/a Products for Power, (hereinafter "Products for Power"), located at 25 Official Road, Addison, Illinois, and to inspect, collect information, take photographs, and copy records as specified below. Products for Power is engaged in the manufacture, sale, marketing and distribution of test tubes and catalytic converter replacement pipes (hereinafter referred to as "test tubes"), devices used to remove and replace the catalytic converters of motor vehicles in violation of section 203(a), 42 U.S.C. § 7522(a).

Section 203(a), 42 U.S.C. § 7522(a) prohibits any person from causing a party regulated under section 203(a)(3) to remove or render inoperative any emission control device or element of design installed on or in a motor vehicle or motor vehicle engine. There is probable cause to believe that Products for Power, through the sale, distribution and promotion of test tubes to regulated automotive repair facilities is "causing" such repair facilities to remove or render inoperative emission control devices in violation of section 203(a)(3) of the Act.

Ms. Paulette B. Peltz, an attorney of the U.S. Environmental Protection Agency, stated in her affidavit (Attachment A): 1) that an EPA investigation of Lew Smith Muffler & Parts, Inc. in Covington, Kentucky indicates that numerous Products for Power test tubes were used by Lew Smith, a regulated party under section 203(a)(3), to replace catalytic converters on motor vehicles (see Attachments A, F and G) and that page 540 of the 1981 Cincinnati Consumer Yellow pages contains an advertisement for Lew Smith Muffler & Parts, Inc. which advertises test tubes to replace catalytic converters (see Attachment G); 2) that Mr. Robert Steelback, the owner of The Mud Hole motor vehicle repair facility in Memphis, Tennessee, stated in regard to an EPA investigation on April 19, 1982, that he had installed test tubes manufactured by Products for Power on motor vehicles after the shop had removed the catalytic converters on those vehicles (see Attachments A and I); 3) that Mr. Ketchum, the owner of Custom Exhaust, Inc., a motor vehicle repair facility located in Lake Worth, Florida, stated to an EPA attorney that he had been replacing catalytic converters with test tubes manufactured by Products for Power. Mr. Ketchum claims he was under the belief it was legal to do so based in part, upon his conversations with Ced Kotowicz, President and owner of Products for Power (see Attachments A and J); 4) that there is reason to believe that the numerous advertisements by Products for Power of test tubes, in such national trade journals as *Muffler Digest*, and *Automotive*

Aftermarket News all of which are directed to parties regulated under section 203(a)(3), promote the removal of catalytic converters on motor vehicles and their replacement with test tubes (see Attachment B); 5) that there is reason to believe that Products for Power attended and marketed test tubes at: (a) the Specialty Equipment Market Association (SEMA) convention and trade shows in 1981, 1982 and 1983; (b) the Automotive Parts and Accessories Association (APAA) national convention and trade shows in 1980 and 1981 and (c) the Exhaust System Professional Association convention and trade show (ESPA) in 1981. These conventions and trade shows are attended primarily by parties regulated under section 203(a)(3). The attendance and marketing of test tubes and the items distributed by Products for Power at such conventions and trade shows promotes the removal of catalytic converters by parties regulated under section 203(a)(3) (see Attachments C and D); 6) that the test tube is packaged in a way that promotes the permanent removal of catalytic converters on motor vehicles (see Attachment E); 7) that based upon a market survey conducted by *Market Facts,* a marketing research firm, it is believed that about 1.5 million catalytic converter replacement pipes were sold during 1981 which represents a ratio of ten (10) replacement pipes sold to each replacement catalytic converter and that a substantial number of regulated persons install such parts (see Attachment H); 8) that in fiscal year 1982 only 5,726 "waiver letters" which permit an individual to legally have the catalytic converter on his motor vehicle removed prior to taking the vehicle out of the country were issued by Federal agents authorized by EPA; 9) that there are five (5) states which have incorporated prohibitions against causing any person to remove emission control devices in their State Implementation Plans (SIPs), which are federally enforceable under the Clean Air Act. These prohibitions against removing emission control devices are not limited to parties regulated under section 203(a)(3), but rather extend

to all persons including individual vehicle owners. The five (5) states are California, Idaho, Virginia, Wisconsin and Texas. Test tubes have been or are being sold by Products for Power in each of the five (5) states: California, Idaho, Virginia, Wisconsin and Texas (see Attachment K) despite the fact that in these states there is no marketplace need for this product but for the insignificant possible use in conjunction with EPA approved catalyst removal waiver letters (*supra*) (see Attachment O). Test tubes are no longer sold in California because the state entered into a Settlement Agreement with Products for Power wherein Products for Power agreed not to "sell any of its 'Test Tube' or 'Dump Tube' products, or any comparable product, to any purchaser in California" (see Attachment L); 10) that a telephone survey by an EPA employee of 20 randomly selected muffler shops and repair facilities in 12 states indicates that 40 percent of the surveyed facilities will install for a customer a test tube in place of a catalytic converter (see Attachment N); 11) Byron O. Pond, Jr., President of Maremont Corporation, one of the nation's largest manufacturers of exhaust system products, stated in a letter to Congressman John D. Dingell dated June 9, 1982, that " . . . we believe that the preponderance of devices being purchased are being used to permanently replace converters. . . ." (see Attachment H).

In order to determine whether violations of section 203(a) of the Act have been or are being committed by Products for Power as alleged by Paulette B. Peltz, it is necessary to inspect and copy (both on and off premises) the following: 1) purchase and sales receipts; 2) billing invoices; 3) shipment invoices; 4) product distribution and customer lists; 5) mail order mailing lists; 6) current inventory and production figure lists; 7) correspondence with purchasers and potential purchasers; 8) memoranda and notes regarding telephone conversations with purchasers and potential purchasers; 9) advertising and marketing surveys and studies; 10) advertising and marketing materials; 11) memoranda, notes or other documents written

by company employees or other persons regarding or relating to the legality of marketing test tubes or installing such devices, and 12) documents regarding test tube test procedures.

The inspection will be conducted during normal business hours, will begin as soon as practicable after issuance of this warrant and will be completed with reasonable promptness.

The inspection will be conducted by United States EPA Enforcement Officers under the following provisions of the Clean Air Act:

(1) Section 203(a), 42 U.S.C. § 7522(a) states that the following acts and the causing thereof are prohibited . . .

> (3)(A) for any person to remove or render inoperative any device or element of design installed on or in a motor vehicle or motor vehicle engine in compliance with regulations under this title prior to its sale and delivery to the ultimate purchaser, or for any manufacturer or dealer knowingly to remove or render inoperative any such device or element of design after such sale and delivery to the ultimate purchaser; or
>
> (B) for any person engaged in the business of repairing, servicing, selling, leasing, or trading motor vehicles or motor vehicle engines, or who operates a fleet of motor vehicles, knowingly to remove or render inoperative any device or element of design installed on or in a motor vehicle or motor vehicle engine in compliance with regulations under this title following its sale and delivery to the ultimate purchaser; . . . .

(2) Section 114(a)(2), 42 U.S.C. § 7414(a), which expressly authorizes Environmental Protection Agency representatives to enter the premises of any person who is subject to any requirement of the Act with respect to Title II (mobile source emissions) and to have access to or copy records at reasonable times to carry out the provisions of the Act.

A return will be made to the Court upon completion of the inspection which will conclude not later than ten (10) days after the warrant is issued.

WHEREFORE, it is respectfully requested that a warrant to enter, inspect, photograph, collect information and copy the records of Products for Power be issued.

Respectfully submitted,

DAN K. WEBB
United States Attorney
Northern District of Illinois

BY: ROBERT T. GRUENBERG
Assistant United States Attorney
219 South Dearborn Street
Chicago, Illinois 60604
(312) 353-4305

ATTACHMENT A

AFFIDAVIT IN SUPPORT OF AN APPLICATION FOR A WARRANT

I, Paulette B. Peltz, being duly sworn upon oath, depose and state that:

1. I am a duly authorized enforcement officer of the United States Environmental Protection Agency (EPA), and my title is Attorney/Advisor, Eastern Field Office, Field Operations and Support Division. In this capacity, I am responsible for conducting investigations to determine compliance with several aspects of the Federal program for control of the emission of air pollutants from motor vehicles, as set forth in the Clean Air Act as amended (hereinafter the "Act"), 42 U.S.C. § 7401 *et seq.*

2. Section 203(a)(3)(A) of the Act, 42 U.S.C. § 7522(a)(3)(A), prohibits any person from removing or rendering inoperative any device or element of design installed on or in a motor vehicle or motor vehicle engine in order to satisfy Federal emission requirements, prior to its sale and delivery to an ultimate purchaser, or for any manufacturer or dealer to knowingly remove or render inoperative any such device after a vehicle's sale and delivery to an ultimate purchaser.

3. Section 203(a)(3)(B) of the Act, 42 U.S.C. § 7522(a)(3)(B), prohibits any person engaged in the business of repairing or servicing motor vehicles or motor vehicle engines from knowingly removing or rendering inoperative any device or element of design installed on or in a motor vehicle or motor vehicle engine in compliance with Federal emission requirements, following its sale and delivery to the ultimate purchaser.

4. Section 203(a) of the Act, 42 U.S.C. § 7522(a), prohibits any person from causing the acts prohibited by sections 203(a)(3)(A) and (B).

5. Section 110(a)(1) of the Act, 42 U.S.C. § 7416, states that each State shall adopt and submit to the Administrator, within nine (9) months after the promulgation of a national primary ambient air quality standard for any air pollutant, a plan which provides for attainment, maintenance, and enforcement of such primary standard in each air quality control region within such State. In addition, such State shall adopt and submit to the Administrator within nine (9) months after the promulgation of a national ambient air quality secondary standard, a plan which provides for attainment, maintenance, and enforcement of such secondary standard in each air quality control region within such State.

6. State implementation plans adopted pursuant to section 110(a)(1) become Federal law and are enforceable under section 113(a) of the Act. Section 113(a)(1) of the Act, 42 U.S.C. § 7413 states that whenever the Administrator finds that any person is in violation of any requirement of an applicable implementation plan, the Administrator shall notify the person in violation of the plan and the State in which the plan applies of such finding. If such violation extends beyond the 30th day after the date of the Administrator's notification, the Administrator may issue an order requiring such person to comply with the requirements of such plan or may bring a civil action

> (b) . . . for a permanent or temporary injunction, or to assess and recover a civil penalty of not more than $25,000 per day of violation, or both whenever such person—
>
> . . .
>
> (b)(2) violates any requirement of an applicable implementation plan . . . more than 30 days after having been notified by the Administrator under subsection (a)(1) that such person is violating such requirement; . . .

42 U.S.C. §§ 7413(b).

This provision may be invoked in five (5) states: California, Idaho, Texas, Virginia, and Wisconsin.

7. Section 27156 of the California Vehicle Code states that . . .

> No person shall install, *sell, offer for sale or advertise* any device, apparatus, or mechanism intended for use with or as a part of, any required motor vehicle pollutant control device or system which alters or modifies the engine design or performance of any such motor vehicle pollutant control device or system. (emphasis added)

This section was adopted as part of the California State Implementation Plan (hereafter cited as "SIP") on March 16, 1979.

8. Section 1-1502 of the Rules and Regulations for the Control of Air Pollution of Idaho states that:

> No person shall allow, suffer, *cause* or permit the removal, disconnection or disabling of a crankcase emission control system or device, exhaust emission control system or device, or any other system or device which has been installed on a motor vehicle in accordance with Federal laws and regulations while such motor vehicle is operating in the State. (emphasis added)

This provision was adopted as part of Idaho's SIP on July 28, 1982.

9. Section 114.1 Regulation IV of the Texas Air Control Board Regulations for Control of Air Pollution from Motor Vehicles states that:

> . . . no person may *cause*, suffer, allow or permit the emission of any air contaminant or the performance of any activity which causes or contributes to a condition of air pollution. (emphasis added)

This section was adopted as part of the Texas SIP on May 31, 1972.

10. Rule EX-10, Section 4.100 of the Emission Standards for Mobile Sources, Part IV of the Commonwealth of Virginia State Air Pollution Control Board Regulation for the Control and Abatement of Air Pollution states:

(1) No owner or other person shall *cause*, suffer, allow or permit the removal, disconnection or disabling of a crankcase emission control system or device, exhaust emission control system or device, fuel evaporative emission control system or device, or other air pollution control system or device which has been installed on a motor vehicle in accordance with Federal laws and regulations while such motor vehicle is operating in the Commonwealth of Virginia. (emphasis added)

This section was adopted as part of the Virginia SIP on May 31, 1972.

11. Section NR 157.17(2) of the State of Wisconsin Administrative Code states:

(2) *Control of Motor Vehicles.* No person shall *cause*, suffer, allow or permit the removal, dismantling, or disrepair of any air pollution control device or system which has been installed on a motor vehicle or internal combustion engine. Such devices or systems include but are not limited to:

(a) Positive crank case ventilation system.

(b) Exhaust emission control devices.

(c) Evaporative fuel loss control systems.

(d) Any control device operating on principles such as thermal decomposition, catalytic oxidation or reduction, absorption or adsorption. (emphasis added)

This section was adopted as part of the Wisconsin SIP on June 21, 1982.

12. A catalytic converter is a device and element of design within the meaning of section 203(a)(3) of the Act, 42 U.S.C. 7522(a)(3). A repair facility therefore violates the Act by removing a catalytic converter and installing a test tube in its place. Under section 203(a) any person who causes such acts by a repair facility also violates the Act.

13. A catalytic converter is a device within the meaning of section 27156 of the California vehicle code; section 1-1502 of the Rules and Regulations for the Control of the Air Pollution of Idaho; Rule EX-10, section 4.100 of the Emissions Standards for Mobile Sources, Part IV of Commonwealth of Virginia State Air Pollution Control Board Regulation for the Control and Abatement of Air Pollution; and section NR 157.17(2) of the State of Wisconsin Administrative Code. Removal of a catalytic converter and replacement with a test tube is an act prohibited by section 114.1 Regulation IV of the Texas Air Control Board Regulations for Control of Air Pollution for Motor Vehicles. Therefore, in each of these five States the removal *by any person* of a catalytic converter and replacement with a test tube violates Federal law as embodied in the applicable State Implementation Plan. Any person who causes such acts by any person also violates Federal law as embodied in the applicable State Implementation Plans.

14. On March 23, 1983, I examined various state laws that deal with the removal and/or rendering inoperative of emission control devices (anti-tampering laws) and determined that in addition to the five states identified in paragraph 13, above approximately thirty (30) states have laws which prohibit any individual from engaging in such conduct. Therefore in each of these states the removal *by any person* of a catalytic converter and replacement with a test tube violates state law.

15. The catalytic converter is the primary emission control device on most cars built since 1975. The removal of a catalytic converter and its replacement with a test tube causes a 200% to 800% increase in hydrocarbon and carbon monoxide emissions. Removal of the catalyst from many cars built since 1981 also causes a 400% to 900% increase in nitrogen oxide emissions.

16. Since August 1982 EPA has initiated enforcement actions by sending notices of violations to 10 muffler shops and auto repair facilities for allegedly removing catalytic converters and replacing them with catalytic converter replacement pipes.

These actions involved the removal of catalysts from 209 cars, and civil penalties of $522,500 were proposed by EPA. During this same period 3 cases alleging the removal of catalytic converters or their replacement by catalytic converter replacement pipes were filed in the federal district courts. These cases involved catalyst removals from 44 cars and potential penalties of $110,000.

17. As an EPA investigator, the activities I perform to determine compliance with the Act include (1) conducting surveillance of facilities which are regulated under section 203(a)(3) of the Act or under State Implementation Plans (SIPs), (2) inspecting and copying records such as work invoices which show or relate to the maintenance and repair of motor vehicles, (3) inspecting motor vehicles and parts thereof, (4) taking photographs of motor vehicles and parts thereof, and (5) inspecting, copying, photographing or obtaining, any evidence which constitutes, relates to, or is part of a violation of the Act or State Implementation Plans under the Act. In the course of my activities, I have become familiar with the various components of motor vehicle exhaust systems along with their location in motor vehicles, and I can identify components such as catalytic converters, mufflers, and plain exhaust tubing.

18. On December 6, 1982, I had a discussion with Rick Friedman an enforcement officer in my office about an investigation he had performed of Lew Smith Muffler and Parts, Inc. in Covington, Kentucky to determine compliance with section 203(a)(3)(B) of the Act. He stated that while performing the inspection of the facility he observed a large stock of test tubes manufactured by Products for Power on the shelves of the facility. He counted and photographed these test tubes (see Attachments F and G) and questioned the owner's son to determine if the shop used test tubes to replace catalytic converters on motor vehicles. He was told that test tubes were used in the past but that currently the shop used a pipe bending machine to make their own replacement pipes (see Attachment F). The shop advertised the fact that they carried "test tubes to

replace catalytic converters" in the 1981 Cincinnati Consumer Yellow Pages as well as through the use of a large sign placed in front of the shop stating, "Test Tubes to Replace Catalytic Converters, Increases Mileage, Saves Gas, More Power" (see Attachment G). An examination of over 100 recent shop invoices revealed at least 25 invoices stating "test tube" on them (see Attachment G). The follow-up investigation (contacting the owner and examining the vehicle) revealed 48 instances in which catalytic converters had been replaced by this muffler shop with catalytic converter replacement pipes. EPA has initiated enforcement proceedings against this muffler shop under section 203(a)(3)(B).

19. On or about December 5, 1982, I had a discussion with George E. Lawrence, Jr., an enforcement officer in my office regarding an investigation he had performed on April 19, 1982, of The Mud Hole, a motor vehicle repair facility located in Memphis, Tennessee. The inspection was performed to determine compliance with section 203(a)(3)(B) of the Act. Mr. Lawrence stated that while inspecting the facility he observed eight (8) test tubes manufactured by Products for Power in the parts sales area (see Attachment I). He then proceeded to question the owner, Robert Steelback, to determine whether The Mud Hole ever installed test tubes. Mr. Steelback told Mr. Lawrence that he had installed such devices because he thought the installation was legal. Further, Mr. Lawrence stated that when he reviewed the facility's work receipts for the two (2) months prior to the inspection he found one (1) receipt, number 4155, which stated that a test tube had been installed on a 1979 AMC vehicle. Mr. Steelback confirmed that he had removed the converter and installed the test tube on the vehicle.

20. On December 1, 1982, I had a discussion with Cheryl Kenny, who at that time was an attorney in my office (she has since left the Agency), regarding a pending enforcement action brought by the EPA against Custom Exhaust, Inc., a motor vehicle repair facility in Florida (see Attachment J). Ms. Kenny stated that the EPA had issued a Notice of Violation

letter against Custom Exhaust, Inc. for violations of section 203(a)(3)(B) of the Act. She further stated that during the course of a conversation with the owner, Doug Ketchum, he stated to her that it was not until he had received the EPA's Notice of Violation that he became aware that it was a violation of Federal law for him to remove a catalytic converter and replace it with a test tube. He told Ms. Kenny that he had been replacing catalytic converters with "test tubes" manufactured by Products for Power. He stated that he had spoken to a man named Ced Kotowicz of Products for Power who had told him that he knew of no requirements restricting the length of time that a test tube could be left on a vehicle after the converter had been removed. Mr. Ketchum also told Ms. Kenny that he had relied on similar statements made by Mr. Kotowicz in a trade magazine.

21. On March 29, 1983, I had a discussion with Dennis Parker, an enforcement officer in my office, regarding a telephone survey Mr. Parker conducted of 20 randomly selected muffler shops and automotive repair facilities in 12 states. Mr. Parker asked the person representing each facility if it would install a catalytic converter replacement pipe on his vehicle. Forty percent (40%) of these regulated repair facilities responded that they would install a test pipe in the place of a catalytic converter (see Attachment N).

22. During the month of November 1982, I examined various issues of several national trade journals. My examination revealed that Products for Power has engaged in extensive advertising of its product known as the "test tube." I found advertisements by Products for Power test tubes in each of the January 1980 through June 1980 issues and each of the August 1980 through November 1980 issues of *Muffler Digest,* a widely distributed national trade journal directed primarily towards repair facilities regulated under section 203(a)(3) (in fact, it describes itself as the "automotive exhaust industry journal") (see Attachment B). In addition, I also found advertisements by Products for Power for this product in the

March 1981 and November 1981 and the January, April, June, July and August 1982 issues of *Automotive Aftermarket News* and the March 1981 issue of *Specialty and Custom Dealer* (in which an advertisement by Detroit Hi-Performance Warehouse was offering the test tube for sale), both of which are trade journals directed toward the trade industry and parties regulated under section 203(a)(3) (see Attachment B). These advertisements in national industry trade journals are likely to promote the removal of catalytic converters from motor vehicles by parties regulated under section 203(a)(3) of the Clean Air Act. The advertisements extol the benefits which customers of parties regulated under section 203(a)(3) of the Act will receive by removing catalytic converters and replacing them with test tubes. The advertisements generally state that customers will save fuel, money, and expensive repairs. Although the advertisements are ostensibly written to promote over-the-counter sales to "do-it-yourself" consumers, there is reason to believe that most consumers are not capable of replacing their own catalytic converters with test tubes and that most consumers in fact *do not* perform such work themselves (see Attachment O).

23. On March 27, 1983, I had a discussion with Dennis Parker, an enforcement officer in my office, regarding the states in which *Muffler Digest, Automotive Aftermarket News,* and *Specialty and Custom Dealer* are distributed. Mr. Parker stated that each of these trade journals is distributed in all 50 states (see Attachment N).

24. On March 25, 1983, I had a discussion with Ross Ruske, an enforcement officer in my office, regarding a number of telephone calls he made to aftermarket auto parts distributors in the states of Texas, Virginia, Wisconsin, and Idaho where he inquired whether these distributors sold catalytic converter eliminator pipes manufactured by Products for Power (see Attachment K). He stated that he found that various distributors in each of these states which have broad antitampering prohibitions in their SIPs offered the test tube for sale.

25. I have reason to believe that Products for Power aggressively promotes its product via attendance at national trade shows and conventions. Products for Power had a booth at the Automotive Parts and Accessories Association Show (APAA) in Chicago in November 1981. A photograph in the December 1981 issue of *Muffler Digest* depicts Products for Power Assistant Sales Manager Denise Kotowicz showing a potential customer a "dump tube" which is a device manufactured by Products for Power which is used to replace a catalytic converter (see Attachment C). The photograph depicts Ms. Kotowicz standing in front of a display of the test tube. Based on a review of past issues of *Muffler Digest* and official trade show directories and exhibitors' lists, there is reason to believe that Products for Power also attended the Exhaust System Professional Association (ESPA) show in New Orleans in January 1981 (see Attachment C), the Automobile Parts and Accessories Association (APAA) show in Atlanta in November 1980 and 1981, and the 1981, 1982, and 1983 Specialty Equipment Market Association Shows (SEMA) in Las Vegas (see Attachment C). At these national trade shows Products for Power displayed and advertised catalytic converter replacement pipes including test tubes. In addition, Products for Power distributed literature and items which promote the use of the test tube (such as a plastic carry bag at the 1983 SEMA Show which promotes the removal of catalytic converters) (see Attachment D). Attendance at these shows is generally restricted to the automotive aftermarket and repair industries including muffler shop owners, parts distributors and automotive repair facility owners, many of which are regulated by the section 203(a) tampering prohibitions of the Act.

26. There is also reason to believe that Products for Power promotes the permanent removal of catalytic converters by the way it packages the test tube. The front of the bright orange box states in large black letters "Test Tube to Replace Catalytic Converters." In small light black letters it states, without explanation "verify the need." Underneath the words appears a

colored drawing of the test tube with the word "IN" next to it and then next to that a drawing of a catalytic converter and the word "OUT" next to it (see Attachment E). The instructions on the side of the box state to remove the catalytic converter and install the test tube in its place and then perform the desired test. The instructions on the box provide no information regarding the tests to be performed. There are no test instructions on or in the box. A footnote on the box states in very small black letters that "Federal, State and local laws may prohibit the user from leaving this device on the vehicle after testing procedures are completed."

27. On April 1, 1983, I had a discussion with Richard Ackerman, a Supervisory Environmental Engineer in my office who stated that the Products for Power advertisements in the trade journals regarding the test tube are ostensibly directed towards increasing over the counter sales. He stated that over the counter sales, however, are only likely to be a limited portion of the total sales of these devices. The advertisements in trade journals such as *Muffler Digest* are directed towards exhaust system repair facilities. He stated that studies conducted by Motor and Equipment Manufacturers Association and Industrial Marketing Research show that approximately two-thirds of all exhaust system repair work is performed by muffler shops and repair facilities (see Attachment O). He further stated with respect to the approximately one-third of exhaust system repairs that are performed by consumers (do-it-yourselfers), less than 4 percent of the parts used for these repairs are purchased from muffler shops by over the counter sales (see Attachment O).

28. On April 1, 1983, I had a conversation with Richard Ackerman, a Supervisory Environmental Engineer in my office who stated that there is no marketplace need for a testing device of this nature in the automotive service industry. He stated that the predominant failure mode of a catalytic converter which would manifest in a customer complaint necessi-

tating diagnosis is a plugging condition. He further stated that an automotive exhaust system mechanic without any particularly sophisticated level of expertise can readily detect a plugged converter through an elementary sequence of diagnostic evaluations. He stated that both the Ford Motor Company and General Motors Corporation for example, have prescribed a simple procedure for use by its dealers requiring standard inexpensive tools for identifying a plugged catalyst (see Attachment O). He further stated that these procedures require the use of a tachometer and vacuum gauge and can generally be completed in less than one hour.

29. The removal of catalytic converters and the replacement of the converter with a catalytic converter replacement pipe such as the test tube manufactured by Products for Power appears to be a pervasive problem. A market survey conducted by *Market Facts,* a market research firm, and submitted to EPA by an aftermarket part manufacturer projects that about 1.5 million catalytic converter replacement pipes were sold during 1981 which represents a ratio of ten (10) replacement pipes sold to each replacement catalytic converter sold (see Attachment H). In contrast, in fiscal year 1982 only 5,726 "waiver letters" (letters issued by the Environmental Protection Agency, the Department of Defense and Department of State as authorized by the Environmental Protection Agency) were issued which permit an individual to take his motor vehicle to a motor vehicle repair facility and have the catalytic converter removed legally because the vehicle is being taken out of the country.

30. On November 3, 1982, I telephoned the Illinois Secretary of State for Corporations and confirmed that Ced's Inc. d/b/a Products for Power is an Illinois corporation and that its registered agent is Arnold M. Frank who is located at 77 West Washington Street, Suite 1220, Chicago, Illinois and that its President is Cedric Kotowicz, and that the corporate address is 25 Official Road, Addison, Illinois.

Based on the facts outlined above, Products for Power is a person within the meaning of section 203(a) cited at paragraph 4 above, and there is probable cause to believe that Products for Power is violating this Federal law and State Implementation Plans under the Act, each of which prohibits causing the removal or rendering inoperative of any emission control device or element of design installed on or in a motor vehicle by specified parties. I have concluded it is necessary to examine the various records of Products for Power to determine the extent to which Products for Power may be violating Federal law.

PAULETTE B. PELTZ
Attorney/ Advisor Field Operations and Support Division United States Environmental Protection Agency

Sworn to before me, and subscribed in my presence this ____ day of _____, 1983.